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IN THE

Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 614 of the Communications Act, 47 U.S.C. § 534, compels cable systems to carry the programming of broadcast television stations — even if doing so is contrary to their editorial judgment and displaces programming that their customers prefer. This Court nonetheless upheld that statute (often called the "must carry" statute) against a facial First Amendment challenge in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). The Court held that, for purposes of a facial challenge, the statute was sufficiently tailored to the congressional objective of ensuring the continued availability of over-the-air broadcast signals for viewing by households not subscribing to cable. That conclusion crucially relied on several important findings about the industry, including that cable operators possessed market power. The questions presented in this case are:

1. Whether the imposition of must-carry obligations is consistent with the Constitution now that the facts undergirding the *Turner* decisions have evaporated with the emergence of vibrant competition and other dramatic market and technological changes.

2. Whether a cable operator may constitutionally be compelled to carry the programming of a broadcast station when, in addition to the industry changes noted above, the station lacks an over-the-air audience in the area in which the station is seeking carriage, the broadcast station's traditional over-the-air market is well outside of that area, the sta-

tion does not need cable carriage to remain viable, the cable operator has declined carriage for legitimate editorial reasons, the cable operator is subject to unusually robust competition, and the carriage mandate is based in part on the content of the station's programming.

3. Whether the order of the Federal Communications Commission in this case can be sustained where it ruled (without meaningful explanation) that compelled carriage is consistent with the statutory requirement that carriage be ordered only where it "better effectuate[s] the [statute's] purposes" and promotes "the value of localism." 47 U.S.C. § 534(h)(1)(C).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

In the court of appeals, Cablevision Systems Corporation was the only petitioner.. The respondents were the Federal Communications Commission and the United States of America. WRNN License Co., LLC, was an intervenor in support of respondents. The National Association of Broadcasters was an *amicus curiae* in support of respondents.

Cablevision Systems Corporation is a publicly traded company. It has no parent corporation. T. Rowe Price Group, Inc., owns 10% or more of Cablevision Systems Corporation's Class A common stock.

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INTRODUCTION

Enacted in 1992, the "must carry" statute, 47 U.S.C. § 534, requires operators of cable television systems to carry and transmit the programming of local television broadcast stations. The statute requires them to do so even when such carriage overrides cable operators' editorial judgment and displaces programming their customers prefer. This Court nonetheless upheld the must-carry statute against a facial First Amendment attack (albeit by the slimmest of margins) in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

Since then, however, the factual underpinnings of those decisions have evaporated. Most importantly, the monopolistic nature of the cable industry that was key to this Court's *Turner* decisions has been replaced by vibrant competition. In *Turner I*, the Court ruled that "[t]he must-carry provisions . . . are justified by . . . the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Turner I*, 512 U.S. at 661. But, as the D.C. Circuit recently determined, cable operators today "no longer have the bottleneck power over programming that concerned the Congress in 1992." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

Despite that change and a host of other important market and technological developments that gut *Turner*'s rationale, the FCC (with the Second Circuit's approval) not only enforced the must-carry statute here, but expanded its application to a new context that cannot be reconciled with *Turner*'s ana-

lysis. In particular, the FCC forced Cablevision to carry the signal of WRNN, a distant home-shopping station with no over-the-air viewership, on its Long Island cable systems. The FCC did so despite Cablevision's determination, in the exercise of its editorial discretion, that the programming of WRNN was not of interest to Cablevision's audience and that carrying the station would require Cablevision to displace programming that Cablevision's customers prefer over WRNN's programming.

Neither the must-carry statute nor its application to these circumstances can be sustained. "[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . that those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938); *see also Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005) (decision of this Court upholding a statute against a facial challenge does not constitute precedent barring later "as-applied challenges"). The factual foundations for the governmental override of editorial judgment contemplated by the must-carry regime have disappeared. And those foundations never could have supported the application here in any event.

The time has therefore come for this Court to revisit this area to determine whether the must-carry regime continues to be consistent with the Constitution. The continuing validity of that intrusion on constitutionally protected interests and the permissibility of expanding its application to new contexts present precisely the kind of important constitutional issues that should constitute the core of this Court's docket. For these and additional reasons stated below, review should be granted.

OPINION AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 570 F.3d 83. The FCC's order (Pet. App. 47a-68a) is reported at 22 FCC Rcd 21054. The order of the FCC's Media Bureau (Pet. App. 27a-46a) is reported at 21 FCC Rcd 5952.

JURISDICTION

The court of appeals entered its judgment on June 22, 2009. Pet. App. 1a. The court of appeals denied a petition for rehearing and rehearing en banc on October 29, 2009. Pet. App. 70a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation." Portions of relevant provisions of the Communications Act of 1934, 47 U.S.C. §§ 534, 535, are reprinted at Pet. App. 72a-96a.

STATEMENT

I. Statutory and Regulatory Background.

A. The Must-Carry Statute.

Enacted in 1992, the must-carry statute, 47 U.S.C. § 534, requires cable systems to retransmit the signals of all "local" commercial television broadcast stations. *Id.* § 534(a), (h)(1)(A); *see also*

47 U.S.C. § 535(a), (l) (creating an analogous carriage regime with respect to noncommercial educational stations). It requires a cable operator to do so even when, in its editorial discretion, it would choose not to carry the station, and even when carrying the broadcast station means that the cable operator must drop or reposition a non-broadcast service that it believes is of more interest to its subscribers.

Congress enacted the must-carry statute out of concern that cable posed a threat to broadcast television, and thus to the availability of video signals for households that do not subscribe to cable. "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming," Congress declared. Cable Television Consumer Protection and Competition Act of 1992 ("*1992 Cable Act*"), Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(10). In "the absence of a requirement that [cable] systems carry local broadcast signals," it concluded, the "economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." *Id.* § 2(a)(16).

Congress's concern rested on an intricate chain of reasoning. Congress believed that cable operators had an economic incentive to exclude broadcast stations from their channel line-up, lest they compete for local advertising. *See id.* § 2(a)(15). Ordinarily, competitive forces should prevent cable operators from acting on that incentive: a cable operator that drops a local television station with popular programming would lose customers to other providers. But Congress concluded that cable operators generally faced no multichannel competition and were

therefore free to act on the incentive without having to fear losing subscribers. *See id.* § 2(a)(2). Congress further determined that television viewers generally stop watching off-air television after subscribing to cable. *See id.* § 2(a)(17). Dropped stations, Congress believed, would therefore lose part of their audience, possibly bankrupting them. *See id.* § 2(a)(16). The end result, Congress feared, would be that consumers unable to afford cable would be left with fewer over-the-air stations to watch. *See id.* § 2(a)(12).

To address this concern, Congress enacted a statute to entitle stations to guaranteed cable carriage in their entire "market." 47 U.S.C. § 534(a), (h)(1)(A). Under FCC rules implementing that statute, markets comprise metropolitan areas and their surroundings. *See* Pet. App. 3a. For example, the New York City market at issue in this case stretches from the Catskills to near Atlantic City, and from the Poconos to Montauk. *See id.*

Local broadcast stations are entitled not merely to carriage in the entire geographic market, but to carriage on their over-the-air channel and on the cable system's service tier that reaches each of the system's subscribers. *See* 47 U.S.C. § 534(b)(6)-(7). Thus, broadcasters are automatically entitled to carriage on the most desirable part of the cable channel line-up — the part on which programmers prefer to be carried.[1]

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[1] *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, ¶ 58 (2008), *vacated on other grounds*, *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

B. The *Turner* Challenge.

In the immediate wake of the statute's enactment, cable operators and programmers brought a facial First Amendment challenge. The district court, however, granted summary judgment against them: it held that the must-carry statute did not trigger strict scrutiny, and that the statute could survive intermediate scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993) (three-judge court).[2]

On review, a five-Justice majority of this Court agreed that Congress's rationale did not trigger strict scrutiny. According to the majority opinion, the must-carry statute "impose[d] burdens and confer[red] benefits without reference to the content of speech." *Turner I*, 512 U.S. at 643. "Congress' overriding objective in enacting must-carry," the Court stated, was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable." *Id.* at 646.

In rejecting calls for strict scrutiny, the Court deemed it crucial that, at that point in time, cable operators lacked competition from other providers of

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[2] The *Turner* plaintiffs brought their facial challenge in a three-judge district court pursuant to a provision making that forum available in a "civil action challenging the constitutionality of [the must-carry statute]." 47 U.S.C. § 555(c)(1). By contrast, Cablevision has invoked the Constitution as a defense in an FCC enforcement proceeding and has appealed pursuant to the Hobbs Act, which provides the exclusive mechanism for obtaining review of an FCC order. *See A-R Cable Servs. — Me., Inc. v. FCC*, Civ. No. 95-134, 1995 WL 283861, at *5 (D. Me. May 10, 1995).

multichannel video service. For example, the Court held that cable operators could not benefit from the principle that laws singling out particular speakers trigger strict scrutiny. According to the Court, must carry was "justified by . . . the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* at 661. Similarly, the Court held that, although laws compelling speech typically receive strict scrutiny, that principle did not trigger strict scrutiny of the must-carry statute. That was so, the Court stated, because "the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Id.* at 656.

The Court did, however, subject the must-carry statute to intermediate scrutiny. *See id.* at 662. Thus, the Court held, must carry's defenders were required to show that the statute "furthers an important or substantial governmental interest," and that must carry's burden on speech is "no greater than is essential to the furtherance of that interest." *Id.* (internal quotation marks omitted).

Applying that standard, the Court held that it was not enough for must carry's defenders to show that must carry promotes abstract goals, such as "the widespread dissemination of information from a multiplicity of sources." *Id.* Rather, the Court required a concrete showing that "recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 664. That meant that must carry's defenders had to prove that, without must carry, "significant numbers of broadcast stations

will be refused carriage on cable systems," and "broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Id.* at 666. Finding that the record evidence did not support such a finding, the five-Justice majority held that the district court had erred by entering summary judgment. *See id.* at 668.

Four Justices (Justice O'Connor, joined by Justices Scalia, Thomas, and Ginsburg) dissented. They would have invalidated the statute outright. In her dissenting opinion (joined by the three other dissenters), Justice O'Connor stated that must carry's preferential treatment of broadcasters was content-based: it reflected a strict-scrutiny-triggering preference for the kind of speech engaged in by broadcast stations over that engaged in by non-broadcast video services. *See id.* at 675-82. Moreover, the dissenting Justices concluded, must carry was so overbroad that it would fail even intermediate scrutiny: it required carriage even in the many instances in which a carriage refusal was not "motivated by anticompetitive impulses" and would not "lead to the broadcaster going out of business." *Id.* at 682. Justice Ginsburg likewise filed a dissenting opinion stating that must carry triggered strict scrutiny and could not survive intermediate scrutiny. *See id.* at 685-86.

Following a remand in which the record was amplified, the Court again reviewed the statute. This time, it upheld the statute by a 5-4 vote, with no opinion garnering the full approval of a majority of Justices. A four-Justice plurality concluded that the record now supported the conclusions that "cable operators had considerable and growing market power," *Turner II*, 520 U.S. at 197; that they had an

incentive to use that power to favor cable-programming services that they owned or on which they could sell advertising, *id.* at 198, 200; and that stations denied carriage would "deteriorate to a substantial degree or fail altogether," *id.* at 208 (internal quotation marks omitted).

In a separate concurrence that supplied the fifth vote, Justice Breyer similarly concluded that the evidence showed that "a cable system . . . at present (*perhaps less in the future*) typically faces little competition, [and] that it therefore constitutes a kind of bottleneck that controls the range of viewer choice." *Id.* at 227-28 (emphasis added). Justice Breyer concluded that, "without the statute, cable systems would likely carry significantly fewer over-the-air stations, that station revenues would therefore decline, and that the quality of over-the-air programming on such stations would almost inevitably suffer." *Id.* at 228 (citations omitted).

Again, four Justices dissented. Justice O'Connor, in a dissenting opinion joined by Justices Scalia, Thomas, and Ginsburg, explained that the remand record showed that only marginal stations were at risk. *See id.* at 233. Arguments that these stations' programming content deserved protection, the dissenters explained, fortified the conclusion that the must-carry scheme was content-based. *See id.* at 233-35. In addition, Justice O'Connor urged, the majority's intermediate-scrutiny analysis reached the wrong result. *See id.* at 235-57.

II. Proceedings in This Case.

A. The FCC's Decisions.

WRNN is a television station licensed to King-

ston, New York, which lies at the very northern tip of the giant New York City television market. WRNN broadcasts mostly home-shopping programming. *See* Pet. App. 17a.[3] Traditionally, WRNN's broadcast signal reached only Kingston and its surroundings. After must carry's enactment, WRNN nonetheless sought carriage far beyond that area. As part of that effort, WRNN sought cable carriage on Cablevision's systems on Long Island — even though television viewers could not receive WRNN's over-the-air signal there, and even though cable systems had never carried it there.

Exercising its editorial discretion, Cablevision determined that carrying WRNN — a station that is licensed to a community as much as 195 miles away from the systems on which the station demanded carriage, *see* Pet. App. 66a n.11, and that broadcasts mostly home-shopping programming — would not improve the mix of speech on its cable systems serving Long Island. In the wake of must carry's enactment, therefore, Cablevision asked the FCC to "remove" Long Island from WRNN's market, invoking a provision empowering the FCC to "exclude communities from" a station's market "to better effectuate the purposes of" the must-carry statute. 47 U.S.C. § 534(h)(1)(C)(i).

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[3] The must-carry statute instructed the FCC to consider whether must-carry rights should be accorded to home-shopping stations — indeed, it instructed the FCC to consider whether home-shopping stations should be allowed to hold broadcast licenses in the first place. *See* 47 U.S.C. § 534(g). The FCC answered both questions in the affirmative. *See Implementation of Section 4(g) of the Cable Television Consumer Prot. and Competition Act of 1992: Home Shopping Station Issues*, Report and Order, 8 FCC Rcd 5321, ¶¶ 22-23, 39 (1993).

Relying in part on WRNN's inability to cast an over-the-air signal over Long Island, the FCC granted Cablevision's request. *See Petition of Cablevision Sys. Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 6453 (CSB 1996), *aff'd*, *Market Modifications and the New York Area of Dominant Influence*, Memorandum Opinion and Order, 12 FCC Rcd 12262 (1997), *aff'd*, *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998).

In an apparent attempt to gain must-carry rights after all, however, a few years later WRNN moved its antenna some 50 miles to the south, extending the reach of its over-the-air signal. *See* Pet. App. 9a, 38a ¶ 11. It also added a small amount of programming that it said was of interest to Long Islanders. *See id.* at 38a ¶ 11; *see also id.* at 41a-43a ¶ 14. It then returned to the FCC, asking the agency to reconsider its prior order.

The FCC granted the request, returning Long Island to WRNN's market. In support of this conclusion, the FCC's Media Bureau relied heavily on a single fact: that WRNN now cast a signal over Long Island. *See id.* at 43a-44a ¶ 16. On review, however, the full FCC added reliance on an additional fact: that "WRNN submitted a substantial record that details programming that focuses on Long Island," which, according to the FCC, "serve[d] to add more support to" WRNN's case. *Id.* at 52a ¶ 4.

Although the full Commission at least acknowledged Cablevision's constitutional arguments (the Bureau had not), it rejected them summarily. For example, the Commission stated briefly its belief that carriage of WRNN would "help to ensure that the . . . station . . . remains a viable option for view-

ers who rely on free, over-the-air television service in Nassau and Suffolk counties." *Id.* at 55a. The Commission did not point to specific facts supporting its conclusion despite its burden of proving facts that would sustain its order against Cablevision's constitutional challenge.

Two of the FCC's five members dissented. The dissenters expressed concern that, instead of helping localism, compelling Cablevision to carry WRNN would hurt it. Cable carriage of WRNN on Long Island, they explained, would give WRNN an incentive to serve Long Island instead of Kingston, its community of license. As the dissenters put it: "There is a point at which the concept of a 'local market' reaches the breaking point and expanding it further will actually damage the localism interests we are trying to serve. For the sake of the people of Kingston, we hope we have not reached that point here." *Id.* 68a. Unwilling to accept that risk, the dissenters would have denied WRNN's market-modification request.

B. The Decision of the Court of Appeals.

Cablevision filed a petition for review of the FCC's order in the United States Court of Appeals for the Second Circuit, invoking 28 U.S.C. § 2341, *et seq.* The court of appeals denied the petition for review. *See* Pet. App. 1a-26a.

The panel rejected Cablevision's contention that the FCC's reliance on WRNN's Long Island-targeted content triggered strict First Amendment scrutiny. *See id.* at 21a-23a. The court cited three reasons: (1) there was no proof "that the restoration of the Long Island communities to WRNN's market . . . was based on some illicit content-based motive";

(2) "WRNN's local programming was an inconsequential factor in the FCC's ultimate decision"; and (3) under the must-carry statute, WRNN had been presumptively entitled to carriage on Long Island. *Id.* at 23a. The FCC "considered the amount of local programming provided by WRNN," the court stated, "only . . . in assessing the continued need to restrict a presumptive market defined solely by geography." *Id.*

The court then held that the FCC's order could withstand intermediate scrutiny. *See id.* at 23a-24a. The court of appeals stated that the FCC's order "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further these interests." *Id.* at 23a (internal quotation marks omitted). The court of appeals added that "[t]he burden imposed by the order — the loss of control over one channel — is no greater than necessary to further the government's interest in preserving a single broadcast channel it found serves the local community." *Id.* at 23a-24a.

The court of appeals also rejected Cablevision's arguments under the Takings Clause of the Fifth Amendment. As noted above, the must-carry statute requires cable operators to carry local stations on a tier that reaches all subscribers. That means that cable companies may not carry local stations on channels that reach, for example, only a subset of digital subscribers. Cablevision therefore argued that compelled carriage of WRNN involves the appropriation of the electronic equivalent of a beachfront lot: a 6 MHz channel on the most widely distributed cable tier. And, Cablevision argued that there is no reason to treat valuable electronic prop-

erty differently than any other form of property. But the court of appeals disagreed, seeing no *per se* taking. *See id.* 24a-26a.

Finally, the court of appeals rejected Cablevision's argument that the FCC had misinterpreted the must-carry statute and failed to justify its decision under it. Under the must-carry statute, the FCC may modify a station's market only if doing so "better effectuate[s] the purposes of" the must-carry statute and promotes "the value of localism." 47 U.S.C. § 534(h)(1)(C). Cablevision argued that the FCC had failed to explain how compelling its Long Island systems to carry WRNN was consistent with either the value of localism (when carriage outside WRNN's traditional service area would only undermine the station's incentive to serve its community of license) or the statutory purpose (when Congress's intent had been to protect broadcast stations from unfair treatment in their traditional markets — not to expand their geographic reach). But the court of appeals ruled that the FCC had permissibly found that WRNN could serve both Kingston and Long Island, and that the must-carry statute was not offended by carriage outside a station's traditional service area. *See* Pet. App. 17a-19a.

Cablevision asked the court of appeals to stay its mandate pending the filing and disposition of a petition for a writ of certiorari, thereby extending a stay pending appeal that the court of appeals had granted earlier. Cablevision showed that compelled carriage of WRNN on the most widely distributed tier would mean dropping or moving C-SPAN (a popular government-affairs service) in some systems and Syfy (a popular entertainment service) in others. Apparently concluding that there was a rea-

sonable probability that this Court would grant Cablevision's petition, the court of appeals granted the motion. *Id.* at 69a; *see id.* at 26a; *see also Conkright v. Frommert*, 129 S. Ct. 1861, 1861-62 (2009) (Ginsburg, J., in chambers) (stay of mandate appropriate only where there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari") (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner I*, 512 U.S. at 641. This Court's decisions in *Turner* nonetheless sanctioned a significant medium-specific deviation from that principle. Relying (among other things) on cable companies' putative position as monopolists, the Court upheld a statute that compelled those companies to carry programming they did not want to carry (thereby displacing programming they do want to carry). Since *Turner*, however, the cable industry has experienced transformative market and technological changes, including the emergence of vibrant competition. Cable companies simply no longer have the "bottleneck" control that was critical to this Court's rationale in *Turner*. In the wake of these changes, compelled carriage pursuant to the must-carry statute is no longer compatible with the Constitution. Moreover, compelled carriage of WRNN by Cablevision's Long Island systems cannot be justified under *Turner*'s rationale quite apart from these changes. And such carriage violates not only the Constitution but also the must-carry statute itself. For all these reasons, and because of the

fundamental nature of the First Amendment freedoms at stake, this Court should grant the petition.

I. THIS COURT SHOULD DECIDE WHETHER THE CONSTITUTION PERMITS MUST-CARRY OBLIGATIONS TO BE IMPOSED UNDER CURRENT CONDITIONS.

This case offers the Court an opportunity to decide whether must-carry obligations may still be imposed consistent with the Constitution despite sweeping industry changes since the 1990s. That issue has broad significance for virtually every cable system and broadcast station in the country — and, thus, for each of the Nation's more than 100 million television households. The question has a deep impact on perhaps the most fundamental of constitutional rights, the right to speak, as well as the equally fundamental right not to speak. And it profoundly affects the rights of viewers and listeners to receive their programming of choice. This case also crisply and squarely presents the question in the preferred context of an "as applied" challenge.[4]

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[4] *See, e.g.*, *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) ("Facial challenges are disfavored . . . ."); *Sabri v. United States*, 541 U.S. 600, 608-09 (2004) ("[F]acial challenges are best when infrequent. Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks.") (citations omitted). At the same time, the as-applied nature of Cablevision's challenge would not prevent the Court from addressing the constitutionality of the must-carry statute as applied even to cable operators other than Cablevision. *See, e.g.*, *Citizens United v. FEC*, No. 08-205, slip op. at 12-20 (U.S. Jan. 21, 2010).

A. *Turner*'s Factual Underpinnings Have Evaporated.

As explained above, this Court in *Turner* rejected a facial First Amendment challenge to must carry by the narrowest of margins. In a pair of 5-4 decisions, the Court held that must-carry did not trigger strict scrutiny and could survive intermediate scrutiny. It so held on the basis of a specific and narrow rationale: (1) that cable operators had an incentive not to carry broadcasters; (2) that cable operators faced no competition and were therefore free to act on the incentive; (3) that stations not carried would lose audience and go dark; and (4) that noncable households would therefore be left with fewer over-the-air viewing options. The Court recognized that it was the Government's burden to prove that the rationale was factually supported.[5] And the Court ultimately (albeit narrowly) held that the Government had carried its burden of proof to sustain the statute against a facial challenge. *See Turner II*, 520 U.S. at 196-224.

In the years since the must-carry statute's 1992 enactment, however, the facts on the ground have changed beyond recognition. Under current circumstances, the FCC can no longer make the required showing — which explains why the FCC did not even attempt to make such a showing in this case.

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[5] *See Turner I*, 512 U.S. at 664 ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.") (internal quotation marks and citations omitted).

In particular, the FCC can no longer show that cable operators possess bottleneck power: Cablevision demonstrated before the FCC that cable operators now face vibrant competition. *See* C.A. App. 325.[6]

As the D.C. Circuit recently noted, "satellite television companies, which were bit players in the early '90s, now serve one-third of all subscribers." *Comcast Corp. v. FCC*, 579 F.3d 1, 3 (D.C. Cir. 2009); *see also* Pet. App. 39a. In light of the new industry paradigm, the D.C. Circuit (while addressing another set of cable regulations) determined that "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992." *Comcast*, 579 F.3d at 8. The D.C. Circuit concluded that, "[c]onsidering the marketplace as it is today and the many significant changes that have occurred since 1992, the FCC has not identified a sufficient basis for imposing upon cable operators the 'special obligations,' *Turner I*, 512 U.S. at 641, represented by the [rules at issue there]." *Comcast*, 579 F.3d at 8.

Those statements stand in sharp contrast to this Court's statement in *Turner I* that "[t]he must-carry provisions . . . are justified by . . . the bottleneck monopoly power exercised by cable operators . . . ." 512 U.S. at 661. Similarly, they stand in sharp contrast to Justice Breyer's fifth-vote-supplying concurrence, which found dispositive that "a cable system . . . at present (*perhaps less in the future*) typically faces little competition, [and] that it therefore constitutes a kind of bottleneck." *Turner II*, 520 U.S. at 227-28 (emphasis added).

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[6] "C.A. App. ___" citations are to the court of appeals appendix.

The future of which Justice Breyer spoke then is now here. Today, cable systems face extensive competition and no longer constitute any kind of bottleneck. Accordingly, *Turner*'s rationale can no longer justify an intrusion on constitutional rights, under intermediate scrutiny or any other standard. Because no alternate rationale has ever been suggested, must carry cannot be sustained.[7]

In addition to the advent of competition, three other important industry changes have fatally undermined *Turner*'s rationale. *First*, *Turner* rested on the predicate that, once consumers subscribe to cable, they lose access to over-the-air signals because, at the time, available "A/B switches" used for toggling between cable and antenna inputs did not work well. *See Turner I*, 512 U.S. at 633; *Turner II*, 520 U.S. at 219-21. By contrast, today's A/B switches are "built into television receivers and can be easily controlled from a TV remote control device." *Carriage of the Transmissions of Digital Television Broad. Stations*, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, ¶ 16 (1998) (footnote omitted). Because viewers today can easily access over-the-air programming even though they subscribe to cable, the FCC cannot establish that broadcast stations need to be carried on cable to reach cable subscribers.

Second, the percentage of Americans who rely on

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[7] *See* R. Matthew Warner, *Reassessing* Turner *and Litigating the Must-Carry Law Beyond a Facial Challenge*, 60 Fed. Comm. L.J. 359, 378 (2008) ("For those communities in which cable operators experience healthy competition, must-carry rules would not achieve Congress's objectives and, thus, as applied in those particular areas, the must-carry law should be considered unconstitutional.").

over-the-air television has plummeted. *Turner* held that compelled cable carriage was needed "to preserve access to free television programming for the 40 percent of Americans without cable." *Turner I*, 512 U.S. at 646. But, by the time WRNN filed its petition, the subset of U.S. households relying on over-the-air television had plummeted to 14 percent. *See* C.A. App. 329. Since then, the number has dwindled even further: the June 2009 transition to digital broadcasting caused large numbers of Americans to give up on over-the-air reception.[8] As the number of Americans relying on over-the-air television has decreased, so too has the weight of the governmental interest in preserving the viewing options of those Americans at the expense of free speech.

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[8] *See* Nielsen Wire, *The Switch from Analog to Digital TV* (Nov. 2, 2009), *available at* http://blog.nielsen.com/nielsenwire/media_entertainment/the-switch-from-analog-to-digital-tv/ (in the wake of the transition, about a quarter of previously "broadcast only" homes signed up for cable or DBS). Indeed, the over-the-air audience is now so small that some have argued that the FCC should terminate over-the-air broadcasting and recapture its valuable spectrum. *See* John Eggerton, *Broadcasters Defend Spectrum From Reclamation Proposals*, Multichannel News (Oct. 26, 2009), *available at* http://www.multichannel.com/article/366507-Broad casters_Defend_Spectrum_From_Reclamation_Proposals.php?rssid=20076&q=broadcast+television+FCC; *see also* Stuart Minor Benjamin, *Roasting the Pig To Burn Down the House: A Modest Proposal*, 7 J. on Telecomms. & High Tech. L. 95, 98 (2009) ("Simply stated, the costs of subsidizing cable or satellite service for the 14% of households that do not subscribe to cable or satellite but want television service would be a small fraction of the value of broadcast frequencies, as reflected in the value of those frequencies at auction once they could be used for any service.").

Finally, cable operators in the 1990s offered only one or two tiers of so-called "analog" service. But cable operators today provide additional "digital" tiers. Because the analog tiers were filled up long ago, new non-broadcast services are nowadays added to the digital tiers, which have fewer subscribers. *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order, 23 FCC Rcd 2134, ¶ 58 (2008), *vacated on other grounds*, *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009). Yet, under the must-carry statute, broadcast stations like WRNN can commandeer a channel on the most widely distributed — and thus most desirable — tier. *See* 47 U.S.C. § 534(b)(7). Thus, in today's video marketplace, the must-carry statute goes well beyond placing broadcast stations on equal footing with non-broadcast services — it grants broadcast stations special privileges.

Indeed, WRNN's business model seems to be built on that fact. In the absence of must carry, the home-shopping station might still be able to secure substantial cable carriage in the New York City market, but it would likely be carried on a digital channel higher on the cable dial and on a less penetrated tier. By claiming must-carry rights, WRNN can occupy a favored spot on the dial alongside the most widely watched cable services. *See* 47 U.S.C. § 534(b)(6)-(7). The Constitution simply cannot justify that result. Must carry was enacted and upheld on the theory that it would protect access to over-the-air broadcast signals — not that it would give broadcasters preferential treatment so that they can capture channel surfers and earn rich home-shopping profits.

B. Whether Imposition of Must-Carry Obligations Remains Consistent with the Constitution Should Be Decided Now.

"Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner I*, 512 U.S. at 636. And "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Id.* at 641. To this principle, the *Turner* holdings recognized a broad and unusual exception — one that compels unwanted speech in a large and important sector of the communications media.

But that exception was never cast in stone — it was predicated on the special market circumstances that existed at the time. As this Court noted just last week, media-specific First Amendment rules "might soon prove to be irrelevant or outdated by technologies that are in rapid flux." *Citizens United v. FEC*, No. 08-205, slip op. at 9 (U.S. Jan. 21, 2010) (citing *Turner I*, 512 U.S. at 639). That is precisely what happened here: the circumstances underpinning *Turner*'s rationale have now ceased to exist. Thus, the time has come for the restraint on speech to be removed as well.

Despite the transforming market and technological changes that have occurred since the 1990s, and despite the D.C. Circuit's *Comcast* decision, the court of appeals in this case held that this Court's *Turner* decisions required it to affirm the FCC's carriage order. *See* Pet. App. 19a-24a. But *Turner* rejected a *facial* attack on the statute. *See Turner I*,

512 U.S. at 671 (Stevens, J., concurring in part and concurring in the judgment). A precedent upholding a statute against a *facial* attack never bars an as-applied challenge, particularly when facts essential to that precedent's holding have changed. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . that those facts have ceased to exist."); *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005) (decision of this Court upholding a statute against a facial challenge does not constitute precedent barring later "as-applied challenges").

The court of appeals' reluctance, however, is not surprising. Both the FCC and WRNN argued before the court of appeals that any other conclusion would in effect overrule *Turner*, and that only this Court has authority to do so.[9] Because other courts of appeals will likely display similar reluctance, a conflict of authority is unlikely to develop.

Granting review in this case has an additional advantage: it will allow the Court to decide whether must carry is consistent not only with the First Amendment, but also with the Takings Clause of the Fifth Amendment. The must-carry statute does not merely appropriate cable operators' valuable

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[9] *See* FCC C.A. Br. 46 ("Much as Cablevision would like to wish the *Turner* decisions away, . . . this Court has no power to overrule or depart from controlling Supreme Court precedent."); WRNN C.A. Br. 55 ("the *Long Island Order* is within the heartland of *Turner*, and this Court is not at liberty to depart from binding Supreme Court precedent unless and until the Court reinterprets that precedent") (internal quotation marks and brackets omitted).

channels;[10] it appropriates channels on the most widely distributed cable tier — the electronic equivalent of a beach-front lot. There is no reason to treat valuable electronic property differently than any other property.[11] Yet this Court has to date not had an opportunity to address whether the full and complete appropriation of the basic property unit in cable television, the individual television channel, effects a *per se* taking: the issue was not presented to this Court in *Turner*. By contrast, Cablevision has carefully preserved the issue throughout the instant litigation. *See* Pet. App. 24a-26a, 55a-58a ¶¶ 8-9. Thus, the Court can address the issue here. For this reason, too, review should be granted.

II. THIS COURT SHOULD DECIDE WHETHER, CONSISTENT WITH THE CONSTITUTION, CABLEVISION'S LONG ISLAND CABLE SYSTEMS MAY BE COMPELLED TO CARRY WRNN.

The Court should also decide whether Cablevision's Long Island systems can be compelled to carry WRNN. Even apart from the industry-wide changes

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[10] The statute itself recognizes that cable channels constitute valuable property. *See* 47 U.S.C. § 532 (providing that a non-broadcast service that a cable system does not wish to carry voluntarily may still secure access to a cable channel if it pays for the privilege).

[11] *See Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1058 (8th Cir. 1978) ("a requirement that facilities be . . . dedicated without compensation . . . would be a deprivation forbidden by the Fifth Amendment"), *aff'd*, 440 U.S. 689 (1979); *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting) ("The creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) . . . .").

described above, *Turner*'s rationale cannot justify compelled carriage of WRNN here. Indeed, because of the decision below, First Amendment values have suffered across the board. Cablevision is not merely being forced to carry programming against its judgment. It must replace valuable cable programming (including the public-affairs programming provided by C-SPAN) with home-shopping programming that consumers desire to watch to a much lesser extent. This issue, moreover, helps place all facts of the case before the Court, providing concrete factual context, illustrating the breadth of must carry's application, and avoiding possible questions about the scope of the other questions presented.

A. Compelled Carriage of WRNN Here Cannot Be Predicated on *Turner*'s Rationale.

In addition to changes in the industry generally, there are five reasons why *Turner*'s rationale cannot be invoked to require Cablevision's Long Island systems to carry WRNN.

First, *Turner* rests fundamentally on the notion that must carry is necessary to safeguard the viewing choices of over-the-air viewers; absent carriage on cable, *Turner* suggested, over-the-air stations serving non-cable subscribers might have insufficient viewers to survive. But WRNN itself has trumpeted that it has *no* over-the-air audience: in asking the FCC for permission to make technical changes to its over-the-air signal, WRNN has stated that "the impact on the public will be imperceptible since, according to Nielsen Media Research, there [is] no reportable over-the-air viewing for the station . . . ." *WRNN-TV Assocs.*, 19 FCC Rcd 12343, 12344 (MB 2004); *see also* Pet. App. 45a ¶ 18 (noting

WRNN's "lack of audience share"). There is no important governmental interest in saving a broadcast signal for an over-the-air audience that does not exist. *See Turner II*, 520 U.S. at 233, 244 (O'Connor, J., dissenting).

Second, and relatedly, *Turner* rested on the notion that broadcasters should be *restored* to the audience that they would have had in a world without cable.[12] *Turner* did not rest on the notion that broadcasters should be made *better off* than they would have been without cable.[13] Here, Cablevision does not provide service to WRNN's traditional broadcast market in upstate New York; it thus does not compete for viewers. Consequently, compelled

[12] *See Turner I*, 512 U.S. at 659 ("Congress granted must-carry privileges to broadcast stations on the belief that the broadcast television industry is in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry."); *id.* at 663 ("protecting noncable households from loss of regular television broadcasting service due to competition from cable systems is an important federal interest") (internal quotation marks omitted); *Turner II*, 520 U.S. at 193 ("In short, Congress enacted must-carry to preserve the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television.") (internal quotation marks omitted); *Turner II*, 520 U.S. at 226 (Breyer, J., concurring) (describing the rationale as being "to prevent . . . a *decline* . . . of programming choice for an ever-shrinking noncable subscribing segment of the public") (emphasis added).

[13] *See Turner II*, 520 U.S. at 222 ("[A] system of subsidies would serve a very different purpose than must-carry. Must-carry is intended not to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to noncable households."); *id.* at 246 (O'Connor, J., dissenting) ("the must-carry provisions have never been justified as a means of *enhancing* broadcast television") (emphasis in original).

carriage here would not give Long Island viewers access to a broadcast station on which they have traditionally relied, or give WRNN access to viewers its traditional over-the-air signals were capable of reaching. It would instead extend WRNN's reach by giving cable subscribers access to an unknown home-shopping station that merely seeks the promise of must-carry riches.

Third, *Turner*'s rationale cannot justify compelled carriage where, as here, there is no evidence that the station seeking carriage will decline absent carriage. *Turner* proposed that "broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Turner I*, 512 U.S. at 666 (plurality); *see id.* at 667; *Turner II*, 520 U.S. at 195, 208. The record here shows that WRNN (a station whose low-cost home-shopping programming is already carried to millions of cable homes) has been on the air for more than a quarter of a century, *see* Pet. App. 34a, and has prospered without carriage on Long Island — so much so that it was able to fund expensive changes to its transmitter without any guarantee of a must-carry pay-off. To defend must carry against a *facial* challenge, it may have been enough for the FCC to show that, without must carry, hardship would befall *some* stations. *But see Turner I*, 512 U.S. at 682 (O'Connor, J., dissenting). In the face of an as-applied challenge, however, there must be a showing that hardship will befall the particular station at issue.

Fourth, *Turner*'s rationale does not apply where, as here, there is no evidence that the cable operator has declined to carry a station with a view to stifling competition. *Turner* posited that must carry was needed to protect stations from cable operators who

might refuse to carry them for an anticompetitive reason, namely to protect themselves from competition for local advertising. There is no record evidence that Cablevision acted on any such motive here. To the contrary, Cablevision declined to carry the home-shopping station because few subscribers are interested in watching it. To defend must carry against a *facial* challenge, it may have been enough for the FCC to show that anticompetitive motives drove *some* carriage decisions. *But see Turner I*, 512 U.S. at 682 (O'Connor, J., dissenting). In the face of an as-applied challenge, however, the Government must prove that anticompetitive motives drove the specific carriage judgment that the Government seeks to override.

Finally, *Turner*'s rationale simply ceases to function where a cable operator is subject to competition. *See supra*, pp. 17-19. *Turner*'s fundamental premise — the reason it found must carry necessary — was that cable operators had market power that enabled them to drop popular broadcast stations without having to fear losing subscribers. But that reasoning no longer holds: all cable systems in the United States are now subject to competition from two satellite operators that have garnered about one third of all subscribers. *See supra*, p.18. Cablevision's systems on Long Island are subject to particularly vibrant competition: as the order under review itself observes, Cablevision's Long Island systems *also* face robust competition from Verizon's fiber-optic cable television service. *See* Pet. App. 52a ¶ 4 n.15.

Under these circumstances, compelling Cablevision's Long Island systems to carry WRNN cannot be justified on the basis of *Turner*. Even apart from the impossibility of reconciling this application of

must carry with *Turner* itself, *see* Sup. Ct. R. 10(c), this application of must carry proves precisely why this Court's immediate intervention is necessary. Must carry is no longer being used merely as a shield to prevent potentially anticompetitive decisions from shutting out over-the-air stations that might fail as a result. It has now become a sword that stations with no over-the-air viewership can invoke to override legitimate editorial choices and expand their geographic scope at the expense of valuable educational programming that viewers prefer to watch. This is something the First Amendment cannot tolerate.

B. The FCC Order Under Review Should Be Subject to Strict Scrutiny.

In *Turner*, this Court recognized that must-carry orders can avoid strict scrutiny only if they "confer must-carry rights on . . . broadcasters . . . irrespective of the content of their programming." *Turner I*, 512 U.S. at 647. This case squarely implicates an aspect of the must-carry statute that is directly contrary to that admonition.

The must-carry statute's market-modification provision states that, in evaluating market-modification requests, the FCC should "afford particular attention to the value of localism" — *i.e.*, to whether a station provides "news coverage of issues of concern to [a] community or provides carriage or coverage of sporting and other events of interest to the community." 47 U.S.C. § 534(h)(1)(C)(ii). In *Turner I*, this Court recognized that this provision "appears to single out . . . broadcasters for special benefits on the basis of content." 512 U.S. at 644 n.6. The Court, however, had no occasion to rule on

the issue on a facial challenge. *See id.*

In this case, by contrast, the FCC expressly relied on this aspect of the statute and cited the content of WRNN's programming as a factor militating in favor of compelled carriage. *See* Pet. App. 51a-52a ¶ 4.[14] Yet the court of appeals held that such consideration of content did not trigger strict scrutiny. *See* Pet. App. 22a-23a. Each of the three reasons listed by the court of appeals is insupportable.

First, the court of appeals erred in suggesting that consideration of content triggers strict scrutiny only when there is an "illicit content-based motive." Pet. App. 23a. This Court has consistently held that "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983); *see also Turner II*, 520 U.S. at 257 (O'Connor, J., dissenting) ("Whether a provision is viewpoint neutral is irrelevant to the question whether it is also *content* neutral."). Thus, the Second Circuit's contrary ruling flies in the face of this Court's unambiguous precedent.

Second, the court of appeals erroneously suggested that strict scrutiny is not triggered if considerations of content are given only "inconsequential" weight. Pet. App. 23a. The court of appeals cited no authority for that proposition, and this Court has re-

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[14] That was hardly unusual – the FCC does so routinely. *See, e.g., Tennessee Broad. Partners*, Memorandum Opinion and Order, 23 FCC Rcd 3928, ¶¶ 61-75 (2008); *Harron Cablevision of Mass. d/b/a Harron Commc'ns Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 16856, ¶ 4 (2003); *Mid-State Television, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 5525, ¶ 15 (2001).

jected the use of *de minimis* exceptions in the First Amendment area. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) ("There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification."); *see also Turner I*, 512 U.S. at 679 (O'Connor, J., dissenting) ("[W]e have never held that the presence of a permissible justification lessens the impropriety of relying in part on an impermissible justification. In fact, we have often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral."); *id.* at 686 (Ginsburg, J., dissenting) ("an intertwined or even discrete content-neutral justification does not render speculative, or reduce to harmless surplus, Congress' evident plan to advance local programming").

Finally, the Second Circuit erred in suggesting that the FCC may consider content in returning WRNN to its statutory "presumptive" market — apparently on the theory that Congress fixed the default market without regard to content. Pet. App. 22a. It may be that, if the FCC had not limited WRNN's market previously, the FCC would not have had an opportunity to restore WRNN to the statutory default and to rely on WRNN's content in the process. But the FCC did limit WRNN's market, it did restore that market, and, in doing so, it did rely on content. If, in restoring WRNN's default market, the FCC had relied on WRNN's political viewpoint, its order undoubtedly would have been impermissibly content-based. It is hard to see how this is any different: "[r]egulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation." *Hill v. Colorado*,

530 U.S. 703, 723 (2000).

In sum, this Court in *Turner* left open whether strict scrutiny is triggered by the market-modification provision's instruction that the FCC consider a station's programming content. That issue is important. And although *Turner* had no occasion to rule on the issue, the Court strongly suggested that the answer is "yes." The court of appeals nonetheless resolved the issue the other way. None of its three purported distinctions is compatible with this Court's precedent. Review of this aspect of the court of appeals' decision is therefore appropriate as well.

III. THIS COURT SHOULD DECIDE WHETHER COMPELLED CARRIAGE OF WRNN IS CONSISTENT WITH THE MUST-CARRY STATUTE.

The Court should also decide whether compelled carriage in this case is consistent with the must-carry statute. The issue is not merely important. It also is closely related to the fundamental constitutional dispute at the core of this case and places before the Court that dispute's full context.

As noted above, the order under review altered WRNN's must-carry market pursuant to 47 U.S.C. § 534(h)(1)(C). That provision states that the FCC may modify stations' markets "to better effectuate the purposes of this section." *Id.* § 534(h)(1)(C)(i). It further states that the FCC must "afford particular attention to the value of localism." *Id.* § 534(h)(1)(C)(ii).

Compelled carriage of WRNN by Cablevision's systems on Long Island will do nothing to further

the value of localism. Localism calls for the needs of Long Islanders to be served by Long Island stations — not by stations from upstate New York.[15] Conversely, localism is not furthered by giving a Kingston station an incentive to neglect its Kingston audience and to cater to a seemingly more appealing audience on Long Island.[16]

More generally, the purpose of the must-carry statute was to restore broadcasters to the audience that they would have had in a world without cable — not to make broadcasters better off than they would have been without cable. *See supra*, p.26. Thus, requiring carriage of WRNN many of miles away from its traditional over-the-air service area

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[15] *See, e.g., Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, ¶ 5 (2008) ("the Commission has long recognized that every community of appreciable size has a presumptive need for its own transmission service") (internal quotation marks omitted).

[16] *See* Pet. App. 68a (Joint Statement of Commissioners Copps and Adelstein, dissenting) ("There is a point at which the concept of a 'local market' reaches the breaking point and expanding it further will actually damage the localism interests we are trying to serve."). Indeed, the FCC previously recognized precisely that in defending against WRNN's attack on the agency's prior market-modification order. *See* Brief of Respondents-Appellees at 29-30, *WLNY-TV, Inc. v. FCC*, No. 97-4243 (2d Cir. Jan. 22, 1998) ("[I]f a station licensed to upstate New York were carried on cable systems serving . . . more densely populated Nassau County, it would have an incentive to provide programming targeted at the more profitable Long Island communities at the expense of the community the station has been licensed to serve. That would defeat the very localism that must carry is intended to promote as well as the congressional policy that television stations be licensed to various communities throughout the country and not just in the most populous areas.").

does not "better effectuate the purposes of" the must-carry statute.

Despite these serious statutory concerns, the FCC held that Cablevision must carry WRNN. It did so without even addressing whether compelled carriage "better effectuate[s] the purposes of this section" and promotes "the value of localism." The FCC thereby violated both the must-carry statute, 47 U.S.C. § 534(h)(1)(C), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 27, 2010

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2007

(Argued: April 7, 2008 Decided: June 22, 2009)

Docket No. 07-5553-ag

CABLEVISION SYSTEMS CORPORATION,
Petitioner,

— v. —

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondents,

WRNN LICENSE COMPANY, LLC,
Intervenor Respondents,

B e f o r e: WALKER, CABRANES, and RAGGI, *Circuit Judges*.

Petition for review of an order of the Federal Communications Commission directing petitioner Cablevision to carry the signal of television station WRNN pursuant to 47 U.S.C. § 534 (a)-(b) & (h)(1)(c). Cablevision argues that the Commission's decision contravenes the text and purpose of the statute, and that the statute, as applied, violated Cablevision's First and Fifth Amendment rights.

PETITION DENIED.

HENK BRANDS (Allan J. Arffa and J. Adam Skaggs, on the brief), Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, D.C., and Howard J.

Symons and Tara M. Corvo (on the brief), Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Washington, D.C., for Petitioner.

JACOB M. LEWIS (Matthew B. Berry, Joseph R. Palmore, and Nicholas A. Degani, Federal Communications Commission, and Thomas O. Barnett, John J. O'Connell, Jr., Catherine G. O'Sullivan, and Robert J. Wiggers, U.S. Department of Justice, on the brief), Federal Communications Commission, Washington, D.C., for Respondent.

ANDREW G. MCBRIDE (Todd M. Stansbury and William S. Consovoy, on the brief), Wiley Rein LLP, Washington, D.C., for Intervenor.

Jane E. Mago, Marsha J. MacBride, and Erin L. Dozier (on the brief), National Association of Broadcasters, Washington, D.C., for Amicus Curiae National Association of Broadcasters.

John M. Walker, Jr., *Circuit Judge*:

The must-carry provisions of the Cable Television Consumer Protection and Competition Act ("1992 Cable Act" or "Cable Act") require cable operators to transmit, over their cable systems, the signals of certain broadcast stations operating in the same market. The statute also gives the Federal Communications Commission ("FCC" or "the Commission") authority to modify a given broadcast station's market, thus potentially changing the universe of cable operators required to carry that station. In this case, Cablevision, a cable systems operator, petitions for review of the FCC's decision to include certain Long Island communities in the market of WRNN, a station broadcasting from upstate New York, and the resulting order directing

Cablevision to carry WRNN on its Long Island cable systems. Because we find no constitutional or legal error in the FCC's decision, we DENY the petition.

BACKGROUND

I. The 1992 Cable Act and Its Must-Carry Provisions

The must-carry provisions of the 1992 Cable Act require "cable operators," such as Cablevision, to carry the signals of a number of "local commercial television stations." 47 U.S.C. § 534(a). The statute caps the number of such stations that a cable operator must carry at "up to one-third of the aggregate number of usable activated channels" on that operator's system. *Id.* § 534(b)(1)(B). For our purposes, a "local commercial television station" is a broadcast station (*i.e.*, a station that transmits its signal over the airwaves) that, "with respect to a particular cable system, is within the same television market as the cable system." *Id.* § 534(h)(1)(A).

A broadcast station's market "shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns." *Id.* § 534(h)(1)(C)(i). Currently, the Commission relies on the commercial publications of Nielsen Media Research that divide the nation into a series of coterminous geographic "Designated Market Areas" ("DMAs") based on viewership patterns. 47 C.F.R. § 76.55(e)(2). For example, the New York City DMA contains not only the five boroughs of the city, but also neighboring areas of Long Island, Connecticut, New Jersey, and upstate New York, as well as limited areas of Pennsylvania, be-

cause people in those areas, in the aggregate, watch the same television channels.

The upshot of the must-carry provisions is that, in general, each cable operator is required to carry the signal of every broadcast station in its DMA, until it has dedicated "one-third of the aggregate number of usable activated channels" on its system to such channels. 47 U.S.C. § 534(b)(1)(B); *see also id.* § 534(a)-(b), (h)(1)(C). Both Cablevision and WRNN are located within the New York City DMA, and Cablevision currently has fewer than one-third of its channels dedicated to must-carry stations.

The only relevant exception to this must-carry rule occurs under the statute's market modification provision. Pursuant to this provision, the FCC may, on written request, add certain communities to, or exclude certain communities from, a given broadcast station's market "to better effectuate the purposes" of the statute. § 534(h)(1)(C)(i). If a given community is excluded from a station's market, cable operators in that community are no longer required to carry that station. If a given community is added, cable operators in that community must commence carriage of that station's signal unless they already devote one-third of their channels to local broadcast stations. *See id.*

In considering market modification requests, the statute instructs the FCC to

> afford particular attention to the value of localism by taking into account such factors as —
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such com-

> munity; [the "historical carriage factor"]
>
> (II) whether the television station provides coverage or other local service to such community; [the "local service factor"]
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; [the "other stations factor"] and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community [the "viewing patterns factor"].

47 U.S.C. § 534(h)(1)(C)(ii)(I)-(IV). The FCC's interpretation and application of this provision lies at the heart of this dispute.

II. The *Turner* Litigation

Shortly after the passage of the 1992 Cable Act, several cable operators mounted a First Amendment challenge to the legislation by claiming that the statute, on its face, impermissibly burdened the rights both of cable programmers, who produce television shows exclusively for cable distribution (*e.g.*, HBO, TNT), and of cable operators, who actually transmit the programming to consumers via coaxial cable (*e.g.*, Cablevision). In *Turner Broadcasting System, Inc. v. FCC* ("*Turner I*"), 512 U.S. 622 (1994), the Supreme Court held that the statute's requirements were content neutral, and therefore subject to intermediate scrutiny. The Court's major-

ity opinion announced that, at least in the abstract, the statute served three "important," interrelated interests articulated by Congress in the statute's findings: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Id.* at 662. The majority, however, concluded that "deficienc[ies]" in the record prevented it from determining whether the statute was sufficiently tailored to further those interests without substantially burdening protected speech and remanded for further proceedings. *Id.* at 667-68.

Significantly, the majority noted that the district court had not addressed whether the language of the market modification provision, with its references to "the value of localism" and to stations "provid[ing] news coverage of issues of concern to such community," altered the content-neutrality of the statute. *Id.* at 643 n.6 (quoting 47 U.S.C. § 534(h)(1)(C)(ii)). The Court did not address this point. *Id.* In a dissent joined by three other justices, Justice O'Connor, relying in part on the language of the market modification provision, wrote that the must-carry regulation was content-based, and thus subject to strict scrutiny, such that it could only be justified by a compelling governmental interest and would have to be narrowly tailored to achieve its intended purpose. *Id.* at 680.

In 1997, with a more fully developed record before it, the Supreme Court held that "the must-carry provisions further important governmental interests" and that the provisions did not violate the

First Amendment because they did "not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys., Inc. v. FCC* ("*Turner II*"), 520 U.S. 180, 185 (1997). None of the opinions in *Turner II* specifically mentioned or cited the market modification provision.

III. Market Modification Decisions in the New York City DMA

In 1996, Cablevision petitioned the FCC to exclude a number of communities from the markets of several local broadcast stations, including WRNN, a station licensed in Kingston, New York that transmitted its signal from Overlook Mountain in Woodstock, New York. The FCC's Cable Services Bureau (the "Bureau") granted Cablevision's request in part and denied it in part, excluding communities in Long Island's Nassau and Suffolk counties from WRNN's market, but declining to exclude communities elsewhere, such as New York's Westchester County and Connecticut's Fairfield County. *Cablevision Sys. Corp.* ("*1996 CSB Order*"), 11 F.C.C.R. 6453 (1996). In making both decisions, the Bureau noted that, in the New York DMA, reliance on the four enumerated factors alone would not allow it to "take into account the particular difficulties faced by these stations in light of the purposes of the carriage rule." *Id.* at 6475 ¶ 50. Accordingly, the Bureau also considered the station's "Grade B contour," *i.e.*, the area within which viewers can receive its broadcast signal over the air, and the "geography and terrain" separating the target communities from the broadcasting station. *Id.* at 6480-81 ¶ 67. In 1997, the FCC affirmed the Bureau's decision, noting that

> Grade B contour coverage, in the absence of other determinative market facts (i.e. where the four statutory factors by themselves define the market, where there is no clear proof that the contour fails to reflect actual coverage, or where there is a terrain obstacle such as a mountain range or a significant body of water) is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of a particular television station's signal.

Market Modifications and the New York Area of Dominant Influence ("*1997 FCC Order*"),[1] 12 F.C.C.R. 12262, 12271 ¶ 17 (1997) (footnote omitted).

When WRNN and several other stations petitioned for review, this court endorsed the agency's reliance on Grade B contour in particular and factors not enumerated in the statute in general. We approved of the view that "the four factors [enumerated in the statute] are not exclusive," and we held that "[t]he FCC and the Cable Services Bureau, experts in the area of regulation of the television industry, carefully and properly analyzed the particular facts of the various petitions under the four factors listed in the statute and under non-statutory factors." *WLNY-TV, Inc. v. FCC*, 163 F.3d 137, 141-42 (2d Cir. 1998).

IV. The Current Proceedings

Subsequent to the outcome of the 1996-98 proceedings, WRNN moved its transmitter to Beacon

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[1] "Area of dominant influence" ("ADI") is the pre-2001 equivalent of the term "Designated Market Area" ("DMA").

Mountain, New York, some 50 miles closer to Manhattan, and commenced digital-only broadcast operations. In 2005, it petitioned the FCC to add back some of the communities in the New York City DMA in its market so that Time Warner Cable, which served the relevant communities, would have to carry WRNN on its system. Relying primarily on Grade B contour and local programming, the FCC's Media Bureau (the successor to the Cable Services Bureau) granted WRNN's request. *WRNN License Co.*, 20 F.C.C.R. 7904, 7911 ¶¶ 15, 16 (2005). Time Warner Cable did not appeal the decision to the full Commission.

In 2006, relevant to the present review, WRNN petitioned for re-inclusion of several communities, this time served by Cablevision, in Long Island's Nassau and Suffolk Counties. The Bureau denied the request as to a number of the Suffolk County communities based on WRNN's failure to comply with "standardized evidentiary requirements." *WRNN License Co.* ("*2006 Bureau Order*"), 21 F.C.C.R. 5952, 5956 ¶ 9 (2006). WRNN does not seek review of the Bureau's decision as to these communities. As to the remaining Nassau and Suffolk communities, which we will refer to as the "Long Island communities," the Bureau noted that the enumerated market modification factors did not offer strong support for WRNN's position. The parties vigorously disputed the amount of Long Island-specific programming WRNN offered, and the Bureau ultimately concluded that the local service factor weighed against carriage. As to the historical carriage factor, the Bureau found it insignificant that both cable systems in neighboring communities and digital broadcast satellite operators in the Long

Island communities carried WRNN. It also accorded little weight to the fact that Verizon was scheduled to begin carrying WRNN on its FiOS system, which delivers television programming to subscribers over fiber optic phone lines, thus competing directly with cable television service. Nonetheless, the Bureau granted WRNN's request to include the remaining Long Island communities, noting that Commission precedent "instructs us to give little weight to the level of viewership [that] station[s] like WRNN achieve" and to treat Grade B contour as a "very relevant factor" when "the other [enumerated] factors would not add significantly to the analysis of a station's market." *Id.* at 5957 ¶ 10. In the Bureau's view, Grade B contour weighed decisively in WRNN's favor.

On appeal, the FCC affirmed the Bureau's order. *WRNN License Co.* ("*2007 FCC Order*"), 22 F.C.C.R. 21054 (2007). It disagreed with the Bureau's analysis of the local service and historical carriage factors, finding that those factors lent additional support to the Bureau's decision to include the Long Island communities in WRNN's market. *Id.* at 21056 ¶ 4 & n. 15. The FCC also rejected Cablevision's claims that the Bureau's application of the market modification provision violated the First Amendment and the takings clause of the Fifth Amendment. *Id.* at 21057-59 ¶¶ 7-10. Cablevision filed a timely petition for review in this court.

DISCUSSION

In general, we will overturn an agency decision "only if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 89

(2d Cir. 2000) (quoting 5 U.S.C. § 706(2)(A)). "An agency's factual findings must be supported by substantial evidence," which means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). We review an agency's disposition of constitutional issues *de novo*. *See Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1313 (D.C. Cir. 1988).

In its petition for review, Cablevision argues that the FCC's order improperly analyzed the statutory factors, that its decision contravened the "purpose" of the must-carry statute, and that requiring Cablevision to carry WRNN violates the First and Fifth Amendments. We address each of these arguments in turn.

I. The FCC's Analysis of the Section 534(h)(1)(C) Factors

A. The Local Service Factor

Cablevision claims that the FCC failed to adequately explain its finding that WRNN provided significant programming targeted to the Long Island communities. By insisting, however, that "at a minimum, the FCC was required to explain" why Cablevision's arguments and evidence to the contrary were "unpersuasive," Cablevision Br. at 35, Cablevision overstates an agency's duty to account for its actions.

An administrative agency has a duty to explain its ultimate action. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action."). However, it need not explain each and

every step leading to this decision; it is enough "if the agency's path may reasonably be discerned." *Id.* (internal quotation marks omitted). Here, the reason for the FCC's decision to affirm the Media Bureau's order is perfectly clear: it agreed with the reasoning of the Bureau in most respects and disagreed in certain others, but only in ways that strengthened the validity of the Bureau's decision. In such circumstances, we will not require the FCC to sift through each piece of evidence offered by a party and explain why it is more or less compelling than the counter-evidence put forth by an opponent.

The fact that we review agency fact-finding for "substantial evidence" supports our conclusion that the FCC's explanation was adequate. To determine whether substantial evidence supports a finding, we need ask only whether "a reasonable mind might accept [it] as adequate" support. *Cellular Phone Taskforce*, 205 F.3d at 89 (internal quotation marks omitted). Here, the agency found WRNN's evidence that it had significant Long Island-targeted programming to be more persuasive than Cablevision's evidence to the contrary. We need not know the agency's precise rationale in order to conclude that it was reasonable for the agency to so find. While such an explanation might have aided our reasonableness inquiry, it is not indispensable.

Both sides offered evidence regarding WRNN's programming content. According to Cablevision, its evidence showed that WRNN broadcast less than an hour of programming covering "Long Island issues" in a "representative week." Cablevision Br. at 33. WRNN pointed to evidence that it had aired over 4000 Long Island-related items between June and

November 2005. It would be reasonable for the agency to resolve this conflicting evidence in favor of WRNN and to conclude (as it obviously did) that Cablevision failed to include some programming that should properly be considered as local to Long Island, or that its sample week was not actually representative. Thus, substantial evidence supports the FCC's finding on this factor.

We note that the Bureau, on its initial consideration of this petition, made a contrary finding as to this factor. This fact, however, does not alter our assessment of the FCC's ultimate determination. "An agency conclusion may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view." *Robinson v. Nat'l Transp. Safety Bd.*, 28 F.3d 210, 215 (D.C. Cir. 1994) (internal quotation marks omitted). On questions of fact, our task on review is not to "displace [the agency's final] choice between two fairly conflicting views." *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

B. The Historical Carriage Factor

After the Bureau issued its 2006 Order, but before the FCC affirmed it, Verizon began carrying WRNN on its FiOS system to areas of Nassau and Suffolk Counties. *2007 FCC Order*, 22 F.C.C.R. at 21056 ¶ 4 & n.15. The FCC concluded that this "overlapping carriage provides support for WRNN-DT with respect to the historic carriage factor." *Id.* at ¶ 4 n.15. In a single paragraph in its brief, Cablevision argues that this analysis is "contrary to clear statutory language" because "[c]arriage initiated in the past few months does not constitute *historical* carriage." Cablevision Br. at 36-37.

Cablevision, however, fails to supply a contrary, "correct" definition of "historically carried," and does not discuss whether we should defer to the Bureau's interpretation of the term, in accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as we did with the must-carry statute generally in *WLNY-TV, Inc. v. FCC*, 163 F.3d at 142. Even if Cablevision could demonstrate error in the sense that the Verizon carriage was not "historical," they have failed to show why such error would warrant vacatur given that (1) Cablevision does not contest the propriety of considering Verizon's carriage as an unenumerated, non-statutory factor, and (2) the Bureau decided to order carriage despite its belief that WRNN had not been "historically carried" in the relevant communities. Accordingly, we decline to vacate the FCC's order based on this asserted error in the FCC's analysis of the historical carriage factor.

C. Grade B Contour

In its *1997 FCC Order* involving Cablevision and WRNN, the Commission stated that "Grade B contour coverage, in the absence of other determinative market facts (i.e.[,] . . . a terrain obstacle such as a mountain range or a significant body of water), is an efficient tool to adjust market boundaries." *1997 FCC Order*, 12 F.C.C.R. at 12271 ¶ 17. Cablevision contends that the Hudson River, the Long Island Sound, and the "skyline of New York City" constitute such terrain obstacles, and it was therefore inconsistent with the *1997 FCC Order* for the FCC and the Bureau to weigh Grade B contour in WRNN's favor here. Cablevision Br. at 38. The *1997 FCC Order* itself forcefully rejects this reason-

ing, because it explicitly *endorses* the use of Grade B contour as proof of market *in the New York City DMA*-the same context in which Cablevision now contends that relying on Grade B contour is inappropriate. Because the *1997 FCC Order* establishes, rather than refutes, the relevance of Grade B contour in market modifications within the New York City DMA, the FCC's decision here is consistent with its precedent.

D. The Other Stations and Viewing Patterns Factors

Cablevision also alleges error in the FCC's treatment of the two remaining statutory factors. In the instant order, the FCC stated that Congress did not intend "the 'coverage by other qualified stations' factor to bar a request for extending a station's market when other stations could be shown to serve the communities at issue." *2007 FCC Order*, 22 F.C.C.R. at 21055-56 ¶ 4.

In essence, then, the FCC decided to give the factor significant weight when a lack of coverage by other stations favored including a community in a station's market, but to discount its importance when the existence of coverage arguably cut against inclusion. Cablevision argues that this decision "is directly contrary to . . . the statutory text." Cablevision Br. at 40. This argument is unavailing. The text of the statute directs the agency to consider a number of factors, and it is clear from the opinion that both the FCC and the Bureau did consider this factor. Upon doing so, the FCC saw no reason to depart from its normal policy, which is to discount the "other stations' coverage" factor when it tends to cut against inclusion. Unsurprisingly, Cablevision

cites no decision of this court vacating a decision because we disagree with an agency's weighing of a statutory factor. The law is to the contrary. In interpreting another provision of the 1992 Cable Act that directs the FCC to undertake a factoral analysis, the D.C. Circuit concluded that giving little or no weight to a statutory factor, as long as the factor is expressly considered, does not violate the statute:

> [T]he statute by its terms merely requires the Commission to consider the . . . factors . . . . That means only that it must reach an express and considered conclusion about the bearing of a factor, but is not required to give any specific weight to it. Therefore, when the Commission, after expressly considering the potential role of the . . . factor, ultimately concluded that it should not be given any weight, it did not violate the statute.

Time Warner Entm't Co. v. FCC, 56 F.3d 151, 175 (D.C. Cir. 1995) (internal quotation marks and citations omitted). This sound reasoning is equally applicable here.

Cablevision also argues that the FCC improperly weighed the evidence with respect to the viewership patterns factor. This argument fails for the same reasons.

II. The FCC's Consideration of the Purposes of the Must-Carry Statute

The market modification provision of the must-carry statute provides that the FCC may add or remove communities from a local broadcast station's market "to better effectuate the purposes of this section." 47 U.S.C. § 534(h)(1)(C)(i). Cablevision argues that the FCC's inclusion of the Long Island

communities in WRNN's market contravened the purposes of must-carry in two ways. First, expanding WRNN's market in fact frustrates the goal of "localism" by necessarily decreasing programming relevant to the community WRNN has traditionally served (the Kingston community). And second, rewarding WRNN's actions with broader must-carry rights encourages gamesmanship which frustrates the purpose of must-carry, which is to preserve, but not expand, a broadcast station's market. We reject the first argument because it incorrectly presumes that WRNN cannot increase Long Island-targeted programming without decreasing Kingston-targeted programming. We reject the second because it rests on a conception of the statute's purpose that is overly narrow, unsupported by precedent, and contrary to the language of the statute.

According to Cablevision, the FCC's decision defeats the purposes of the must-carry statute because "[a]ny targeting of other spokes [i.e., communities that are remote from 'a DMA's metropolitan center'] necessarily comes at the expense of the station's community of license." Cablevision Br. at 43. This argument rests on the false premise that WRNN's programming consists entirely of either Kingston-specific programming or Long Island-specific programming. As Cablevision reminds us elsewhere, however, a great deal of WRNN's content is "home-shopping" programming that targets neither Kingston nor Long Island specifically. *See* Cablevision Br. at 33 (claiming that 78% of WRNN programming in a representative week "consisted of home shopping and infomercials"). It is entirely possible, and Cablevision does not suggest otherwise, that WRNN could increase its Long Island-targeted pro-

gramming by decreasing its home-shopping programming, leaving its Kingston-targeted programming unaffected. And to the extent that a Kingston viewer might prefer certain home-shopping programming to programming concerning Long Island, we do not see how frustrating *that* preference undermines localism.

Essentially, Cablevision's claim is that, as a matter of law, a cable company in a community that is outside a "DMA's metropolitan center," such as Long Island, should not be required to carry a station based in a different community that is also remote from the center, such as Kingston: in Cablevision's parlance, a "spoke" cable company should not be required to carry a station based in a different spoke. Congress, however, did not share that view, and, as the FCC points out, the default rule is that WRNN must be carried by cable operators throughout the New York City DMA. *See* 47 U.S.C. § 534(a)-(b), (h)(1)(C).

Cablevision also contends that the FCC's decision rewards "gamesmanship" because WRNN moved its transmitter and changed its programming simply to obtain must-carry privileges in other communities. Cablevision Br. at 46. In other words, they suggest that the FCC cannot award WRNN a regulatory benefit if WRNN has changed its conduct in an attempt to receive that benefit. This rule, applied universally, would run counter to a central premise of the regulatory scheme that a regulated entity will change its conduct in socially desirable ways to achieve a regulatory benefit. Accordingly, we reject it.

Cablevision also argues that any decision that increases a station's market is contrary to the purpose of the statute, because the purpose is "to return broadcasters to their 'natural market,'" Cablevision Br. at 47; thus, any FCC action which augments a broadcaster's market contravenes this purpose. The purpose of the statute, however, is not to "preserve" a group of broadcast stations, or a particular conception of a station's market, but, *inter alia*, to "preserv[e] the benefits of free, over-the-air television," and "promot[e] the widespread dissemination of information from a multiplicity of sources." *Turner I*, 512 U.S. at 662. We do not think that these purposes are served only by granting broadcasters the minimum must-carry coverage necessary for survival; or that these purposes are frustrated by actions which result in a station's greater prosperity. Accordingly, we conclude that the FCC did not violate the statutory admonition that market modifications should be made "to better effectuate the purposes of this section." 47 U.S.C. § 534(h)(1)(C)(i). The remainder of Cablevision's arguments on this point fail to persuade us otherwise.

III. Cablevision's First Amendment Challenge

Cablevision argues that "compelled carriage of WRNN on Long Island violates the First Amendment on an as-applied basis." Cablevision Br. at 51. We think that the *Turner* cases do not foreclose the possibility of a successful as-applied First Amendment challenge to the 1992 Cable Act's market modification provisions. In this case, however, Cablevision has failed to demonstrate that the FCC applied the market modification provision unconstitutionally.

As a threshold matter, a party alleging violation of its First Amendment rights must show that the challenged government action actually regulates protected speech. Thus, in *Turner I*, the Court found it necessary to establish, as an "initial premise," that "[c]able programmers and cable operators engage in and transmit speech," and that "the must-carry rules," in general, "regulate cable speech." 512 U.S. at 636. Similarly, Cablevision here must articulate *how* the FCC's order "interferes with [its] speech rights." *Time Warner Entm't Co.*, 240 F.3d at 1129.

This threshold requirement serves two interrelated functions. Identifying the "burden" imposed by government action enables a court to undertake heightened scrutiny analysis: without understanding how a regulation burdens speech, a court cannot decide whether that burden is "no greater than is essential" to further the goals of the regulation in question. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). And the failure to identify the burden has an even more fundamental consequence: without a plausible allegation that the offensive conduct interferes with First Amendment rights or, put differently, that the interaction between government and citizen "bring[s] into play the First Amendment," *id.* at 376, a reviewing court has neither a reason nor the ability to subject the conduct of the governmental actor to heightened scrutiny.

The *Turner I* and *Turner II* Courts considered the First Amendment implications of the "must-carry provisions" taken as a whole, as distinguished from the market modification provisions at issue here,

and found that they posed two potential burdens on speech rights:

> First, the [must-carry] provisions restrain cable operators' editorial discretion in creating programming packages by reducing the number of cable channels over which they exercise unfettered control. Second, the rules render it more difficult for cable programmers to compete for carriage on the limited channels remaining.

Turner II, 520 U.S. at 214 (citation, alterations, and internal quotation marks omitted); *accord Turner I*, 512 U.S. at 637.

Cablevision raises a similar, but not identical, First Amendment challenge to that raised in *Turner I* and *Turner II*. Cablevision presents an as-applied First Amendment challenge to the FCC's order modifying the market of WRNN, pursuant to the provision of the must-carry statute on market determinations, 47 U.S.C. § 534(h)(1)(C)(ii). The challenged order threatens the First Amendment interest of Cablevision in a similar manner to that described in *Turner I* and *Turner II*. The order reduces the number of channels over which Cablevision exercises editorial control by forcing it to carry WRNN, *see Turner II*, 520 U.S. at 213, and it also makes it more difficult for the cable programming arm of Cablevision to compete for carriage on the remaining channels, *id.*

In order to apply the appropriate level of scrutiny, we must first determine whether the order is content based or content neutral. *Turner I*, 512 U.S. at 642. In *Turner I*, the Court concluded that the burdens imposed on cable operators as well as the benefits conferred on broadcast channels were con-

tent neutral. *See id.* at 643-44 ("Although the provisions interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators' programming. The rules impose obligations upon all operators, save those with fewer than 300 subscribers, regardless of the programs or stations they now offer or have offered in the past."); *id.* at 645 (noting that the selection of broadcast channels that must be carried on the cable systems was "also unrelated to content").

The *Turner I* Court explicitly rejected the argument that "the must-carry regulations are content based because Congress' purpose in enacting them was to promote speech of a favored content." *Id.* at 646. Indeed, as the Court noted, when a cable system is required to "make room for a broadcast station, nothing would stop a cable operator from displacing a cable station that provides all local- or education-oriented programming with a broadcaster that provides very little." *Id.* at 648. However, separate from the must-carry provisions' general requirements, the *Turner I* Court expressly declined to decide whether a market modification order motivated by a concern for localism would be content based or content neutral. *See id.* at 644 n.6. The Court suggested that such an order might confer "special benefits on the basis of content." *Id.*

However, we think the order before us now is content neutral. WRNN's presumptive DMA would have included Nassau and Suffolk counties. It was Cablevision that first invoked the market modification provision to exclude these counties from

WRNN's market. It succeeded based on the FCC's concern, in part, that WRNN lacked a Grade B contour reaching Long Island. When WRNN, after expanding its Grade B contour, returned to the FCC seeking restoration of its presumptive DMA, Cablevision argued that the station had failed to demonstrate that the various factors outlined in the market modification provision, including the local programming factor, weighed in WRNN's favor. The Bureau and the FCC reached different conclusions on this factor, yet both agreed that the totality of circumstances no longer justified excluding Long Island communities from WRNN's presumptive DMA. The FCC considered the amount of local programming provided by WRNN only in this context, *i.e.*, in assessing the continued need to restrict a presumptive market defined solely by geography. Moreover, WRNN's local programming was an inconsequential factor in the FCC's ultimate decision. Additionally, Cablevision has not alleged, much less proven, that the restoration of the Long Island communities to WRNN's market under these circumstances was based on some illicit content-based motive. *See id.* at 652. We conclude, therefore, that the order is content neutral and deserving of intermediate scrutiny.

We have no trouble in concluding that the order "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further these interests." *Turner II*, 520 U.S. at 189 (citing *O'Brien*, 391 U.S. at 377). The burden imposed by the order — the loss of control over one channel — is no greater than necessary to further the government's interest in preserving a single

broadcast channel it found serves the local community.

In sum, we conclude that the application of the market modification provision in this case does not violate the First Amendment. While we cannot rule out the possibility that the FCC's order might interfere with speech rights in other ways, Cablevision has presented neither factual support nor even a theory of any such additional infringement.

IV. Cablevision's Fifth Amendment Challenge

Finally, Cablevision asserts that by ordering it to carry WRNN, the FCC effected a *per se* taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The *sine qua non* of the takings analysis in *Loretto*, however, is "permanent *physical* occupation." *Id.* (emphasis added). This *per se* takings rule is "very narrow," *id.* at 441, and its touchstone is "required acquiescence" to the occupation of the property by an uninvited stranger or an "interloper with a government license." *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252-53 (1987); *see also Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006) ("Physical takings (or physical invasion or appropriation cases) occur when the government physically takes possession of an interest in property for some public purpose."). Our own test for whether a regulation constitutes a permanent physical occupation, set forth in *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), looks to (1) the permanency of the invasion, and (2) whether the invasion is an "absolute, exclusive physical occupation." *Id.* at 94-95. In turn, we must examine the nature of the interference with "the bundle of rights that constitute ownership," *id.* at

95, such as the right to possess and exclude, the right to control the use of the property, and the right to sell the property.

The initial determination — whether the invasion is physical — is primarily factual. *Cf. John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006) ("[T]he determination of whether government occupancy is 'permanent' is highly fact-specific."). The fact finder must determine, in the first instance, whether any physical assets are involved. *See, e.g.*, *Qwest Corp. v. United States*, 48 Fed. Cl. 672, 689 (2001) ("In determining whether plaintiff's property has been subject to a physical taking, our initial inquiry must focus on the nature of the property at issue. What are the physical assets involved?"). The FCC found that the transmission of WRNN over the Cablevision system did not require installation of any equipment at Cablevision's facilities. "Rather, a programming stream is transmitted in bits of data over cable bandwidth through electrons or photons at the speed of light." *2007 FCC Order*, 22 F.C.C.R. at 21058 ¶ 8. It further found that Cablevision "retains complete control over its property." *Id.* We see no reason to disturb these findings or the conclusion that the transmission of WRNN's signal does not involve a physical occupation of Cablevision's equipment or property. And Cablevision effectively conceded that this physicality is absent here when it argued in its reply brief that "[t]he result [under *Loretto*] should be no different when the occupation is not of a *physical* pipeline but of an electronic one." Cablevision Reply Br. at 25.

The amorphous nature of the alleged "taking" suggests that the takings claim here fits more comfortably within the Supreme Court's "regulatory taking" analytical framework. *See Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104 (1978). In order to establish a regulatory taking, Cablevision was required to show that the regulation had an economic impact that interfered with "distinct investment-backed expectations." *Id.* at 124. Cablevision has presented no such evidence despite its "heavy burden" on this issue, *Tobe*, 464 F.3d at 375, and any regulatory taking theory must therefore fail.

CONCLUSION

Because we find no abuse of discretion or constitutional violation in the FCC's decision to include the relevant Long Island communities in WRNN's market for must-carry purposes, we DENY the petition for review. In accordance with our order of March 14, 2008, the stay of the FCC order pending judicial review is vacated, and the applicable deadline for Cablevision's compliance is one week from the issuance of the mandate in this case.

APPENDIX B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WRNN License Company, LLC

Petition for Modification of Television Market of
Television Station WRNN-DT, Kingston, New York

CSR 6956-A

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 2006
Released: May 25, 2006

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. WRNN License Company, LLC ("WRNN"), licensee of television station WRNN-DT, Kingston, New York ("WRNN-DT" or the "Station"), filed the above captioned petition for special relief, seeking to modify the Station's market to include all cable communities located in Nassau and Suffolk Counties that are served by Cablevision Systems Corporation's ("Cablevision") cable systems in which the Station is not carried (the "Communities"). Cablevision filed an opposition to the petition and WRNN filed a reply. Cablevision filed a surreply, and WRNN filed a response. For the reasons stated below, we grant the petition in part and deny the petition in part.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order")*,[1] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its designated market area ("DMA"), as defined by Nielsen Media Research.[2] A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Each county in the United States is assigned to a market based on the home-market stations that receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing

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[1] 8 FCC Rcd 2965, 2976-2977 (1993).

[2] Section 614(h)(1)(C) of the Communications Act, as amended, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) of the Commission's rules requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 C.F.R. § 76.55(e); *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999)(*"Modification Final Report and Order"*).

are included.[3]

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.[4]

4. In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as —
>
> (I) whether the station, or other stations located in the same area, has been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage

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[3] For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation.*

[4] 47 U.S.C. § 534(h)(1)(C).

or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and non-cable households within the areas served by the cable system or systems in such community.[5]

5. The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market.

* * * *

[This subsection] establishes certain criteria that the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

6. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence ap-

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[5] *Must Carry Order*, 8 FCC Rcd at 2976 (1993).

[6] H.R. Rep. 102-628, 102d Cong., 2d Sess 97 (1992).

proach for modification petitions that requires the following evidence be submitted:

(1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(2) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relation to the service areas.

Note: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.[7]

(3) Available data on shopping and labor patterns in the local market.

(4) Television station programming information derived from station logs or the local edition of the television guides.

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[7] The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

(5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(6) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.[8]

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Market Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.[9]

7. In *Carriage of Digital Television Broadcast Signals*, the Commission concluded that under Section 614(a) of the Act, a digital-only television station has mandatory carriage rights, and amended the rules accordingly.[10] The Commission has estab-

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[8] 47 C.F.R. § 76.59(b).

[9] *Market Modification Final Report and Order*, 14 FCC Rcd at 8389.

[10] *See Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2606 (2001)("*DTV Must Carry Report and Order*"); 47 C.F.R. § 76.64(f)(4). The Commission concluded that for purposes of supporting the conversion to digital signals and facilitating the return of the analog spectrum, a television station may demand that one of its high definition digital

lished a framework for analyzing market modifications for digital television stations.[11] The Commission stated that Nielsen's market designations, publications, and assignments for the analog television market should continue to be binding on broadcast stations transitioning to digital television broadcasting. The presumption is that the market of the station's digital signal is coterminous with the station's market area for its analog signal during the transition period.[12] The Commission also found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, will be applicable to digital television modification petitions during the transition period when television stations broadcast both an analog signal and a digital signal.[13] The Commission recognized that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of the analog television signal. Therefore, in deciding DTV market modification cases, the Commission

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("HDTV") or standard definition digital ("SDTV") television signals be carried on the cable system for delivery to subscribers in either a digital or an analog format. *DTV Must Carry Report and Order*, 16 FCC Rcd at 2630.

[11] *See DTV Must Carry Report and Order*, 16 FCC Rcd at 2635-36.

[12] We note that in adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to insure that a station's digital over-the-air coverage area would replicate as closely as possible its current over-the-air analog coverage area. *See Sixth DTV Report and Order*, 12 FCC Rcd 14588, 14605 (1997).

[13] *See DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

stated that it would take into consideration changes in signal strength and technical coverage because of new digital television channel assignments and power limits. It concluded that all other matters concerning the modification process for digital television signals will be decided on a case-by-case basis.[14]

8. In 1985, WRNN inaugurated service on analog Channel 62 from a transmitter located on Overlook Mountain in Woodstock, New York and the station's main studios in Kingston, New York. In 1996, by a Cable Services Bureau Order, the Communities at issue in this Petition were deleted from WRNN's analog television market for purposes of must carry.[15] On review of the Bureau Order, the Commission concluded that WRNN failed to satisfy any statutory criteria applicable to market modification proceedings.[16] The Commission found that WRNN had no history of cable carriage on Cablevision's systems serving the Communities, that WRNN did not provide local service to the Communities, and that WRNN did not place either a Grade A or Grade B contour over the Communities.[17] In addition, the Commission concluded that WRNN is geographi-

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[14] *Id.*

[15] *See Petition of Cablevision Systems Corporation for Modification of the ADI of Television Broadcast Stations WTBY, WRNN, WMBC-TV, and WHAI-TV*, 11 FCC Rcd 6453 (1996) (*WRNN Modification Decision*), aff'd *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998) ("*WLNY-TV, Inc.*").

[16] *Market Modifications and the N.Y. Area of Dominant Influence*, 12 FCC Rcd 12262 (1997) ("*NY ADI Order*").

[17] *Id.* at 12266-67; *see WRNN Modification Decision*, 11 FCC Rcd at 6480-6481.

cally distant from the Communities with Woodstock, New York, where the station's transmitter site was located, an average of 104.75 miles away.[18] The *NY ADI Order* also found that several television stations licensed to New York City and adjacent communities had a closer economic nexus, cast a City Grade signal over the Communities, and provided more focused local programming than WRNN.[19] The Commission also determined that WRNN had no audience in the counties in which the cable systems were located.[20]

9. Cablevision serves the communities at issue with essentially three large cable systems serving Nassau County; Suffolk County; and Shelter Island, Riverhead, and East Hampton (the "Shelter Island System") which are also located in Suffolk County, New York. We will first address WRNN's market modification request relating to the communities served by Cablevision's Suffolk, County; and Shelter Island cable systems. As noted earlier, in the *Modification Final Report and Order*, the Commission adopted standardized evidentiary requirements covering DMA modification petitions. WRNN's petition fails to include information required by the *Modification Final Report and Order* with respect to the communities served by Cablevision's Suffolk County and Shelter Island cable systems, and accordingly

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[18] *NY ADI Order*, 12 FCC Rcd at 12266-67; *see WRNN Modification Decision* 11 FCC Rcd at 6480.

[19] *NY ADI Order*, 12 FCC Rcd at 12266-67; *see WRNN Modification Decision* 11 FCC Rcd at 6480.

[20] *NY ADI Order*, 12 FCC Rcd at 12266-67; *see WRNN Modification Decision* 11 FCC Rcd at 6480.

WRNN's petition with regard to these systems will be dismissed. In this instance, we note that WRNN's petition fails to include information regarding the first and second evidentiary provisions of the *Modification Final Report Order*. These provisions require petitioners, such as WRNN, to include maps illustrating the relevant community locations. While WRNN provided a map showing WRNN-DT's predicted 41 dBu signal contour, it did not provide a map clearly illustrating the relevant cable communities and their distances from the WRNN transmitter site.[21] While 41 dBu coverage in the Nassau County Communities is apparent, we cannot make a reasoned analysis with respect to the isolated communities served by Cablevision in Suffolk County including Cablevision's Shelter Island system without a map indicating coverage in each specific Community.[22] Consequently, we will dismiss WRNN's petition with regard to the communities served from Cablevision's Suffolk County; and Shelter Island cable systems. In doing so, we also note that it is evident that WRNN is geographically distant from the Communities in Suffolk County, and that the Station is separated from those Suffolk County Communities by the significant barriers that the Long Island Sound and New York City present.[23] In addition, we note that WRNN's signal levels covering these isolated communities appear to be

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[21] 47 C.F.R. §76.59(b).

[22] *See* WRNN Petition at Exhibit 2.

[23] Indeed, the driving distance between Islip, New York, one of the closest Suffolk County Communities and Kingston, New York, WRNN-DT's community of license, is over 143 miles. Cablevision Opposition at Exhibit 3.

weaker, as well as, more dispersed over this area of Long Island.

10. As noted above, and contrary to the situation regarding the communities served by Cablevision's systems located in Suffolk County, it is apparent that WRNN's 41dBu signal covers all of Nassau County. Consequently the information relating to maps and other geographic information becomes less important in our analysis of WRNN's petition as it relates to the Nassau Communities. Therefore, we will address the arguments raised by the parties with respect to the communities served by Cablevision's Nassau County cable system. However, before we address the specific arguments raised by the parties, we note that the Commission in the *NY ADI Order* addressed a very similar factual pattern to that presented by WRNN's Petition.[24] There, the Commission recognized that stations, like WRNN, that offer specialty programming generally have low viewership levels, and for that reason the Commission instructs us to give little weight to the level of viewership station's like WRNN achieve.[25] Also the Commission's decision in the *NY ADI Order* recognized that in instances where the other three factors would not add significantly to the analysis of a station's market, Grade B coverage becomes a very relevant factor in determining whether to modify a particular station's market.[26] In this instance, were we to apply the other three statutory factors without considering WRRN's signal coverage, WRNN would

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[24] *NY ADI Order*, 12 FCC Rcd at 12271.

[25] *Id.*

[26] *Id.*

have little if any carriage rights anywhere within its New York Market. Consequently, we will address WRNN's petition with the Commission's guidance in mind.

11. WRNN asserts that since the *WRNN Modification Order*, it has modified its operations and program services and currently provides a unique local service to the Communities located in Nassau County from its digital-only television facilities.[27] WRNN argues that it is geographically proximate to the Nassau Communities because its new digital transmitter site is located on Beacon Mountain, New York, which is significantly closer to the Nassau Communities that its old analog antenna site[28] WRNN emphasizes that the change in circumstances that led the Commission to modify WRNN-DT's market to include cable systems in New York City, also warrant the addition of the Nassau Communities to WRNN-DT's market.[29] Cablevision responds that the Nassau Communities are significantly distant from WRNN-DT's transmitter,[30] and that WRNN-DT's signal is weak in the Communities.[31] Further, Cablevision argues and that the

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[27] WRNN Petition at 10-11.

[28] *Id.* at 12-13, Exhibit 7, citing *Busse Broadcasting Corp.*, 11 FCC Rcd 6408, 6416, 6422-25 (1996), *Jasas Corp.*, 14 FCC Rcd 6968, 6972 (1999).

[29] *Id.* at 4-5, citing *WRNN License Company, LLC, Petition for Modification of the Television Market of WRNN-DT, Kingston, New York*, 20 FCC Rcd 7904 (MB 2005) ("*WRNN NYC Modification Decision*").

[30] Cablevision Opposition at 11-23.

[31] *Id.* at 23-24.

changes in circumstances that the Commission found relevant in the *WRNN NYC Modification Decision* are not relevant to the Communities, especially given the geographic barriers that separate the Communities from WRNN-DT's community of license and the dearth of WRNN-DT programming that is relevant to residents of the Nassau Communities.[32] WRNN's market modification arguments and Cablevision's responsive arguments are set forth in detail below.

Historic Carriage. WRNN-DT is a single channel digital-only television station operating on DTV Channel 48.[33] WRNN asserts that cable systems in areas adjacent to the Communities have historically carried the Station.[34] Additionally, WRNN states that digital broadcast satellite (DBS) operators DirecTV and EchoStar make the station available to a significant number of residents in the Nassau Communities via local-into-local service,[35] and that Verizon plans to carry the Station on its competitive systems in the Nassau Communities.[36] Cablevision counters that neither WRNN-DT nor WTBY, another Kingston-area broadcast station, has history of carriage on cable systems in the Nassau Communities. Cablevision argues that only one of the 78 Communities abuts a community where WRNN-DT (or its analog predecessor) has historically been carried, and that all of the Communities are in a differ-

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[32] *Id.* at 50-52.

[33] WRNN Petition at 1.

[34] *Id.* at 8-9.

[35] *Id.*

[36] WRNN Response at 2.

ent county than the adjacent communities.[37] Further, Cablevision asserts that DBS operators are statutorily required to carry all broadcast stations in a DMA if the DBS operator carries any broadcast station in that DMA and the markets may not be modified.[38] Therefore, DBS carriage is not reliable evidence of historic carriage.[39]

12. We find that WRNN-DT (and its analog predecessor) has not been historically carried on the cable systems that serve the Nassau Communities. The Commission has, however, held that carriage on systems that serve "communities adjacent to and near the Communities at issue is indicative of interest in the programming of" the station,[40] and WRNN presents evidence of carriage on cable systems that are adjacent or sufficiently near to those Communities that reside in Nassau County.[41]

13. **Local Service.** WRNN asserts that it essentially provides a 48 dBu City grade signal to all of Nassau County Communities.[42] It states that the current coverage of the Nassau County Communities is the result of facilities modifications that WRNN has undertaken pursuant to Commission

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[37] Cablevision Opposition at 10.

[38] Cablevision Surreply at 9, citing 47 C.F.R. § 76.66(b).

[39] Cablevision Surreply at 9.

[40] *Petition of Paxson Communications Corporation for Modification of Television Market of Station WPXD(TV). Ann Arbor, Michigan*, 13 FCC Rcd 17869, 17874 (1998).

[41] *See* WRNN Petition at 8-9, Exhibit 5.

[42] *Id.* at 10-11.

approval.[43] According to WRNN, the Nassau Communities are geographically proximate to WRNN-DT, and that the Communities are even closer to WRNN-DT's main studio in Manhattan.[44] WRNN argues that the distances between the Nassau Communities and the Station are well within the range that the Commission has approved for adding communities to a station's must carry market, or in refusing to delete communities from a station's market.[45] Cablevision notes that the Nassau Communities and the Station are separated by the Long Island Sound, and asserts that the driving distance from the closest Community to WRNN-DT's community of license is 111 miles.[46]

14. Each party has filed extensive engineering reports that support their respective coverage claims.[47] On balance, we conclude that WRNN's report demonstrating that it provides a 41 dBu signal, the functional equivalent of a Grade B signal contour, over all of Nassau County to be accurate and consistent with good engineering practices.[48] As the Commission has previously held, Grade B coverage "is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of

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[43] *Id.*

[44] *Id.* at 12-14.

[45] *Id.* at 13.

[46] Cablevision Opposition at Exhibit 3.

[47] *See id.* at Exhibit 6; WRNN Reply at Exhibits A, B and C; Cablevision Surreply at 3-7; WRNN Response at 4-5.

[48] *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 5945, 5957 (2001).

a particular television station's signal."[49] With regard to programming, WRNN asserts that it airs more than fourteen hours per week of daily, regularly scheduled, local news and public affairs programming of specific relevance to the Communities, including "RNN Metro" and "Richard French Live."[51] WRNN points out that "Richard French Live" covers national and global issues as well, but in a manner that is of particular interest to the Communities.[52] In addition, WRNN asserts that the Station provides a wide range of other news and information programming targeted to the Communities, including "News on the Hour" in which Station reporters provide local weather, news, financial reports and traffic reports covering the Communities,[53] averaging over 650 Long Island specific reports every month.[54] WRNN also states that it provides entertainment calendar updates listing ongoing and one-time events throughout the New York City area and in the Communities,[55] and that it originates and airs numerous sporting events and sports scores of high schools and colleges located throughout the Communities.[56] WRNN offers letters from several local political leaders in support of carriage of WRNN-DT on cable systems in the

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[49] *NY ADI Order*, 12 FCC Rcd at 12271.

[51] WRNN Petition at 15-23.

[52] *Id.* at 20.

[53] *Id.* at 25-26, Exhibits 18-20.

[54] WRNN Reply at 13.

[55] WRNN Petition at 27-28.

[56] *Id.* at 26-27.

Communities, asserting that WRNN-DT serves the local needs of the Communities.[57]

15. Cablevision counters that WRNN-DT does not air fourteen hours of local news and public affairs programming that is specifically relevant to the Communities.[58] According to Cablevision, less than one hour of WRNN-DT's weekly programming is dedicated to covering Long Island issues.[59] Cablevision also argues that many of WRNN-DT's Long Island specific reports are short in duration (often part of a headline scroll), and that most news stories that WRNN-DT airs are national, regional and global in scope.[60]

16. We disagree with WRNN's assertion that WRNN-DT airs fourteen hours of programming that is of specific relevance to the Communities every week. The programming analysis that WRNN submitted does not indicate that much of WRNN-DT's programming concerning Long Island focuses on those Communities in Nassau County.[61] Further, WRNN-DT's situation is consistent with the "hub and spoke" model described by the Second Circuit in *WLNY-TV, Inc*,[63] in which the outlying "spoke"

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[57] *See id.* at Exhibits 9-17.

[58] Cablevision Opposition at 33.

[59] *Id.* at 34-35.

[60] *Id.* at 10-11.

[61] *See* WRNN Petition at Exhibit 4.

[63] *See WLNY-TV, Inc.*, 163 F.3d at 144. Indeed, *WLNY-TV, Inc.* dealt with this same issue before WRNN-DT upgraded its system, upholding the Commission's decision to remove Long Island communities from WRNN's market.

communities in Nassau County and New York's Hudson Valley are connected by the "hub" of New York City. The "spoke" market programming generally is not of interest to other "spoke" communities. The record in this proceeding is not impressive relative to WRNN's programming targeted to the Nassau Communities. Nevertheless, the record does indicate that WRNN airs at least some programming aimed at the Nassau Communities. More impressive, however, is the evidence that WRNN-DT places a Grade B signal contour over all of Nassau County. Indeed, WRNN-DT places a City Grade signal contour over a substantial portion of Nassau County.[64] Based on the Commission's guidance in the *NY ADI Order*,[65] we find that, in this instance, the local coverage and service factor weighs in favor of modifying of WRNN-DT's market with respect to Cablevision's Communities within Nassau County.

17. **Coverage by Other Qualified Stations**. We believe that Congress did not intend this factor to bar a request, but rather intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue.[66] As we stated in the *WRNN Modification Decision*, however, the Communities have, "an abundance of far

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[64] A 48 dBu signal contour is the functional equivalent of a City Grade signal contour. *See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 5945, 5957 (2001).

[65] *See supra* nn. 24-26 and accompanying text (discussing the *NY ADI Order*).

[66] *See, e.g., WRNN NYC Modification Decision*, 20 FCC Rcd at 7911, *Lenfest Broadcasting, LLC*, 19 FCC Rcd 8970, 8980 (2004).

closer New York City and Long Island stations programming to the cable communities."[67] Therefore, we assign no weight to this factor.

18. **Viewership Patterns**. WRNN submits evidence that WRNN-DT's cume rating in the Communities is a 5.9, argues that "[l]ast year, Long Island residents placed hundreds of [home shopping] orders with WRNN," and offers that since the beginning of 2004, WRNN has received 1,800 phone calls from the Communities.[68] We do not believe that Long Island viewership patterns of WRNN-DT meet our "moderate level of viewership" threshold.[69] We note, however, that in cases of stations with home shopping formats, which are specialty stations, we do not weigh heavily a lack of audience share.[70] Therefore, while WRNN-DT may have limited audience appeal, this factor is not outcome determinative on its own.

19. **Conclusion.** In view of the foregoing, we find that grant of WRNN's petition with respect to those communities served by Cablevision's Nassau County cable system is in the public interest.[71]

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[67] *WRNN Modification Decision*, 11 FCC Rcd at 6481.

[68] WRNN Petition at 29-31.

[69] In *KSBW License, Inc.*, the station at issue had a 22 cume, more than three times WRNN-DT's reported cume. *KSBW License, Inc.*, 11 FCC Rcd 2368, 2371 (1996).

[70] *Avenue Cable Service, Inc.* 11 FCC Rcd 4803, 4812 (1996).

[71] WRNN's petition is granted with respect to all of the communities served by Cablevision's system with the identifier PSID 003146. *See* WRNN Petition at Exhibit 1 (List of Communities). We note that ten of the Communities served by

III. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended,[72] and Section 76.59 of the Commission's rules[73] that the captioned petition for special relief (CSR-6956-A), filed by WRNN License Company, LLC **IS GRANTED IN PART** and **IS DENIED IN PART** to the extent indicated herein.

21. These actions are taken pursuant to authority delegated by Section 0.283 of the Commission's rules.[74]

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

PSID 003146 reside in Suffolk County. We include these communities in the modification of WRNN-DT's market because they are an integrated part of Cablevision's Nassau County system, and are in close proximity to Cablevision's Nassau County cable system.

[72] 47 U.S.C. § 534(h).

[73] 47 C.F.R. § 76.59.

[74] 47 C.F.R. § 0.283.

APPENDIX C

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition of WRNN License Company, LLC

For Modification of Television Market For Television Station WRNN-DT, Kingston, New York

Application for Review

CSR-6956-A

WRNN License Company, LLC

v.

Cablevision Systems Corporation

Request for Mandatory Carriage of Television Station WRNN-DT, Kingston, New York

CSR-7053-M

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 2007
Released: November 29, 2007

By the Commission: Commissioners Copps and Adelstein dissenting and issuing a joint statement.

I. INTRODUCTION

1. Cablevision Systems Corporation ("Cablevision") has filed an application for review, pursuant to Section 1.115 of the Commission's rules (the

"Rules"),[1] of the Memorandum Opinion and Order in *WRNN License Company, LLC*.[2] In that Order, the Media Bureau (the "Bureau"), pursuant to Section 614(h)(1)(C) of the Communications Act of 1934, as amended (the "Act"),[3] granted in part the petition of WRNN License Company, LLC ("WRNN") for modification of television station WRNN-DT's market to include cable communities located in Nassau and Suffolk Counties, New York (the "Communities"). WRNN filed an opposition to Cablevision's application, and Cablevision filed a reply to the opposition. Based on our review of the record in this proceeding, we deny Cablevision's application for review.

2. WRNN also filed a must-carry complaint against Cablevision for carriage of WRNN-DT on cable systems serving the Communities. Cablevision filed an opposition to which WRNN replied. WRNN also made a supplemental filing to which Cablevision replied. In light of the similar facts, parties, and issues presented in these proceedings,

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[1] 47 C.F.R. § 1.115.

[2] *WRNN License Company, LLC Petition for Modification of Television Market of Television Station WRNN-DT, Kingston, New York*, Memorandum Opinion and Order, 21 FCC Rcd 5952 (MB 2006) ("*WRNN-DT Modification Order*").

[3] 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) of the Rules requires that a commercial broadcast television station's market be defined by Nielsen Media Research's Designated Market Areas, or "DMAs". *See Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999); 47 C.F.R. § 76.55(e).

we consolidate them for purposes of this action.[4] Based on our review of the record in these proceeding, we order Cablevision to commence carriage of WRNN-DT within 60 days from the date on which WRNN provides the necessary specialized equipment to receive a good quality signal at Cablevision's principal headend.[5]

II. DISCUSSION

3. In the *WRNN-DT Modification Order*, the Bureau applied the four factors set forth in Section 614(h)(1)(C)[6] and concluded that all of the communi-

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[4] *See MCI Telecommunications Corp. v. Pac. Northwest Bell Tel. Co.*, Memorandum Opinion and Order, 5 FCC Rcd 216, 218 n.25 (1990) ("Due to the similarity of the issues and arguments raised by the parties, the complaints have been consolidated for disposition"); *Aerco Broadcasting Corporation And R y F Broadcasting Inc. v. DIRECTV, Inc., DIRECTV Latin America, LLC, And Echostar Satellite, LLC*, Memorandum Opinion and Order, 21 FCC Rcd 5853 (MB 2006).

[5] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2991 (1993) ("*Must Carry Order*"); *Maranatha Broadcasting Company, Inc., Licensee of WFMZ-TV, Allentown, Pennsylvania v. Harron Communications Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 10409, 10414 (CSB 1996).

[6] The four statutory factors are: "(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; (II) whether the television station provides coverage or other local service to such community; (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and

ties in Nassau County and certain communities in Suffolk County should be considered part of WRNN-DT's local market.[7] Cablevision's application seeks review of the *WRNN-DT Modification Order* on the grounds that the Order is based on erroneous findings as to material questions of fact, does not consider Cablevision's constitutional arguments, and conflicts with the Act and Commission precedent.[8] Cablevision contends that the Bureau erred in its application of each statutory factor, and gave overwhelming weight to WRNN-DT's signal coverage.[9] WRNN opposed the application, arguing that the Bureau applied the four statutory factors properly and followed applicable Commission precedent.

4. Section 614(h)(1)(C) of the Act requires the Commission to include or exclude particular communities from a television station's market to ensure that a television station is carried in the areas it serves and in its economic market.[10] We have re-

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other events of interest to the community; and (IV) evidence of viewing patterns in cable and non-cable households within the areas served by the cable system or systems in such community." 47 U.S.C. § 534(h)(1)(C)(ii).

[7] *WRNN-DT Modification Order*, 21 FCC Rcd at 5957-5961. The Bureau declined WRNN-DT's request to modify its market to include 24 separate cable communities in Suffolk County. *See id.* at 5961 n.71.

[8] *See* Application for Review at 1-2.

[9] *Id.*

[10] *See* H.R. REP. NO. 102-628, at 97 (1992); *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12926 (MMB 1999) ("DMAs are a better measure of actual television viewing patterns, and thus serve as a good measure of the economic mar-

viewed the record in this proceeding, which need not be restated in detail, and we find that the Bureau correctly modified WRNN-DT's market. As the Commission has stated on numerous occasions, we do not believe that Congress intended the "coverage by other qualified stations" factor to bar a request for extending a station's market when other stations could be shown to serve the communities at issue. Rather, we continue to believe this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue.[11] We also agree with the Bureau's conclusion that in the case of specialty stations, the viewership factor should not be afforded significant weight.[12] We note, however, that the Bureau erred in its analysis of WRNN-DT's programming by finding that WRNN's record evidence did not support a finding of significant programming

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ketplace in which broadcasters, program suppliers and advertisers buy and sell their services and products"); *see also Petition of Frederick Cablevision, Inc. and C/R TV Cable, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 753, 754 (MB 2005).

[11] *WRNN-DT Modification Order*, 21 FCC Rcd at 5960, citing *WRNN License Company, LLC, Petition for Modification of the Television Market of WRNN-DT, Kingston, New York*, Memorandum Opinion and Order, 20 FCC Rcd 7904, 7911 (MB 2005). *See also Lenfest Broadcasting, LLC*, Memorandum Opinion and Order, 19 FCC Rcd 8970, 8980 (MB 2004), *Great Trails Broadcasting Corp.*, Memorandum Opinion and Order, 10 FCC Rcd 8629, 8633-34 (CSB 1995), *Paxson San Jose License, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17520, 17526 (CSB 1997).

[12] *WRNN-DT Modification Order*, 21 FCC Rcd at 5960 (citing *Avenue Cable Service, Inc.*, 11 FCC Rcd 4803, 4812 (1996)).

targeted to communities in Long Island.[13] WRNN submitted a substantial record that details programming that focuses on Long Island, particularly communities in Nassau County and communities in Suffolk County that border Nassau County.[14] Correction of this error, however, serves to add more support to the conclusions underlying the Bureau's decision to modify WRNN-DT's market. Additionally, the justification for modifying WRNN-DT's market has strengthened since the *WRNN-DT Modification Order*, as WRNN-DT is now carried on competitive cable systems in Nassau and Suffolk Counties.[15]

5. Cablevision asserts that the Bureau's decision to modify WRNN-DT's market to include certain cable communities in Suffolk County conflicts with the statute and with Commission precedent. While the Bureau should have clarified that its analysis of the statutory factors applied equally to the Suffolk County communities served by Cablevision's Woodbury and Islip systems, we believe that carriage in those Suffolk County communities is in accordance with the Act and Commission precedent. The record demonstrates that WRNN-DT's signal strength in

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[13] *See WRNN-DT Modification Order*, 21 FCC Rcd at 5959-5960.

[14] *See* WRNN Petition at Exhibit 4.

[15] *See* Opposition to Application for Review at 7, 15. Verizon carries WRNN-DT on its systems in Massapequa Park, Oyster Bay and Hempstead, New York. *Id.* at 7. This overlapping carriage provides support for WRNN-DT with respect to the historic carriage factor. *See* 47 U.S.C. § 534(h)(1)(C)(ii)(I).

those specific communities,[16] the local programming that WRNN-DT directs toward those specific communities,[17] and WRNN-DT's carriage on overlapping and adjacent systems in those specific communities[18] all support modification of WRNN-DT's local market to include those specific communities. We also note that those specific communities are served by the same physical system that serves cable communities in Nassau County. As a result, grant of WRNN's petition with respect to those ten communities served by Cablevision's Woodbury and Islip systems was proper.[19] Therefore, we find no conflict between the *WRNN-DT Modification Order* and the Act or Commission precedent.

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[16] *See* WRNN Petition at Exhibit 2

[17] *See id.* at Exhibit 4.

[18] *See* WRNN Reply to Opposition at 6, Opposition to Application for Review at 7, 15.

[19] Cablevision and WRNN agree that the Act and Commission precedent dictate that requests to modify a station's market shall be reviewed on a community-by-community basis. *See* Application for Review at 24 (citing 47 U.S.C. § 534(h)(1)(C)(i)); Opposition to Application for Review at 16, (citing *Young Broadcasting of Lansing, Inc.*; *Petition for Modification of the Television Market of Television Station WLNS-TV, Lansing, Michigan*, Memorandum Opinion and Order, 18 FCC Rcd 24889, 24891 (MB 2003) (citing *Must Carry Order*, 8 FCC Rcd at 2977, n.139)). Based on our review of the record and the factors listed in Section 614(h)(1)(c) of the Act, the ten communities in Suffolk County are distinguishable from the other cable communities in Suffolk County (*e.g.*, WRNN-DT provided record evidence of significant programming targeted to those communities and those communities fall within WRNN-DT's coverage contour).

6. Cablevision argues that the *WRNN-DT Modification Order* results in unconstitutional infringement of Cablevision's free speech rights under the First Amendment of the Constitution, as well as an unconstitutional taking of Cablevision's property under the Fifth Amendment of the Constitution.[20] While Cablevision argues that the Commission "has previously recognized that it has discretion to decide constitutional claims,"[21] we note at the outset that the United States Supreme Court has upheld the constitutionality of Section 614 of the Act.[22]

7. Turning to the specifics of Cablevision's contentions, we first address Cablevision's argument that mandatory carriage of WRNN-DT constitutes an as-applied First Amendment violation. To the contrary, we find that Supreme Court precedent supports carriage of WRNN-DT's signal. In the context here — concerning a challenge to a content-neutral regulation — the intermediate scrutiny standard applies.[23] Under that framework, the Supreme Court has sustained Section 614 of the Act's mandatory carriage requirements against facial challenge, finding that the obligations further three

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[20] Application for Review at 16-22.

[21] *Id.* at 22 (citing *WXTV License Partnership, G.P. Petition for Special Relief Concerning Carriage of Television Station WXTV, Paterson, New Jersey on Channel 41 on Certain Cablevision Cable Systems in the New York Television Market*, Order on Reconsideration, 15 FCC Rcd 3308, 3317-3319 (2000)).

[22] *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

[23] U.S. CONST. amend. I; *Turner Broadcasting System v. FCC*, 512 U.S. 623, 661-662 (1994) ("*Turner I*") (citing *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968)).

important governmental interests unrelated to the suppression of free expression and that the statutorily imposed burden is no greater than necessary to further those interests.[24] Even assuming a party may mount an as-applied First Amendment challenge to the carriage of an individual station in the face of this Supreme Court precedent, we find, applying that precedent to the facts at issue in this case, that Cablevision's carriage of WRNN-DT furthers at least two of the three interests identified by the Court. In particular, we find that carriage will help to ensure that the digital-only station (1) remains a viable option for viewers who rely on free, over-the-air television service in Nassau and Suffolk counties, and (2) continues to number among the multiplicity of information sources available to viewers in those counties. Moreover, compelled carriage of WRNN-DT does not burden substantially more speech than necessary because the obligation is no more extensive than is necessary to further the government interests identified above and is not more extensive than that occasioned by Cablevision's carriage of any other television broadcast station pursuant to section 614.[25]

8. Second, we do not find that Cablevision has demonstrated that mandatory carriage of WRNN-DT would constitute a Fifth Amendment taking un-

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[24] *Turner I*, 512 U.S. at 647, 655; *Turner II*, 520 U.S. at 209, 224 (1997) (finding that requirements serve to preserve the benefits of free, over-the-air broadcast television; promote widespread dissemination of information from a multiplicity of sources; and promote fair competition in the market for television programming).

[25] *Turner II*, 520 U.S. at 215-216.

der either the "*per se*" or "regulatory" takings analyses.[26] To qualify as a *per se* taking, the challenged government action must authorize a permanent physical occupation of property or result in the loss of all economically viable use of property.[27] *Per se* takings are defined without regard to the public interest they may serve,[28] the size of the occupation,[29] or the economic impact on the property owner.[30] Contrary to Cablevision's argument, we do not believe that a *per se* takings analysis applies here. The Supreme Court has advised that a *per se* taking is "relatively rare and easily identified,"[31] and this is

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[26] The "takings" clause of the Fifth Amendment provides that no private property: "shall . . . be taken for public use, without just compensation." U.S. CONST. amend. V. For discussion of the two current strains of takings analyses, *"per se"* or "regulatory," *see generally Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992)(*"Yee"*).

[27] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (*"Loretto"*); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-1019 (1992) (*"Lucas"*).

[28] *Loretto*, *supra* n. 27, 458 U.S. at 426 ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").

[29] *Id.* at 436-37 ("[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.").

[30] *Id.* at 434 ("[O]ur cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.").

[31] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002) (*"Tahoe-Sierra Pres. Council, Inc."*).

neither. Mandatory carriage regulation effectuates no permanent physical occupation of a cable operator's property, such as installation of the physical equipment at issue in *Loretto v. Teleprompter Manhattan CATV Corp.*[32] Rather, a programming stream is transmitted in bits of data over cable bandwidth through electrons or photons at the speed of light while the cable operator retains complete control over its physical property (*e.g.*, headend equipment). Moreover, because carriage of a single station represents only a small fraction of available bandwidth, Cablevision has not shown a loss of all economically viable use of its property.[33] Courts have rejected application of permanent physical occupation to the technological realm,[34] and we believe these decisions to be consistent with the Supreme Court's admonition that a permanent physical occupation of property is easily identifiable and "presents relatively few problems of proof."[35]

9. As for its alternative takings claim, Cablevision presents virtually no substantive argument that requiring carriage of WRNN-DT would constitute a regulatory taking. A regulatory taking analysis is conducted under the multi-factor inquiry set forth in *Penn Central Transportation Co. v. City*

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[32] *Loretto*, *supra* n. 27.

[33] *Cf. Lucas*, *supra* n. 27, 505 U.S. at 1014-1019; *Tahoe-Sierra Pres. Council, Inc*, *supra* n. 31, 535 U.S. at 330-331 (2002).

[34] *See, e.g., Qwest Corp. v. United States*, 48 Fed. Cl. 672, 693-94 (2001).

[35] *Loretto*, *supra* n. 27, 458 U.S. at 437; *see also Tahoe-Sierra Pres. Council, Inc.*, *supra* n. 31, 535 U.S. at 324.

of New York:[36] (1) the character of the governmental action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations.[37] Cablevision, however, addresses none of these factors. Furthermore, in employing this test, we find no evidence in the record that requiring carriage of WRNN-DT will have a significant economic impact on Cablevision or will interfere with the company's reasonable, investment-backed expectations. Indeed, based upon the statutory cap for commercial stations and the numerical limit for non-commercial stations, cable operators should reasonably expect to devote up to one-third of their capacity to carriage of local broadcast stations.[38] Finally, we believe the governmental action at issue to be a modest attempt to "adjust the benefits and burdens of economic life to promote the common good," in what traditionally has been and remains a regulated industry.[39] Therefore, we reject Cablevision's constitutional arguments, and for the above reasons deny Cablevision's petition.

10. Based on the foregoing, Cablevision is required to carry WRNN-DT in the Communities.[40] Consistent with our rules, WRNN-DT provided Ca-

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[36] *Penn Central Transportation Co. v. City of New York* 438 U.S. 104, 124 (1978) ("*Penn Cent. Transp. Co.*").

[37] *See FCC v. Florida Power Co.*,, 480 U.S. 245, 252 (1982) (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124). *See also Yee*, *supra* n. 26, 503 U.S. at 523; *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

[38] *See* 47 U.S.C. §§ 534(b) and 535(b).

[39] *Penn Cent. Transp. Co.*, *supra* n. 36, 438 U.S. at 124.

[40] *See* 47 C.F.R. § 76.56(b).

blevision notice that it wished to exercise its carriage rights.[41] Cablevision's main argument against carriage — the pending application for review of the *WRNN-DT Modification Order*[42] — is now moot. Furthermore, WRNN has sufficiently addressed Cablevision's other concerns by promising to pay any costs associated with downconverting its signal from digital to analog for carriage on the basic analog tier,[43] and by promising to provide the necessary specialized equipment to receive a good quality signal at Cablevision's principal headend.[44] Therefore, we order Cablevision to carry WRNN-DT on cable systems serving Nassau County, including the system that serves the ten communities in Suffolk County, 60 days from the date on which WRNN provides the equipment necessary to receive a good quality signal at Cablevision's principal headend.

III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, pursuant to Sections 1, 4(i), 5(c), 405, and 614(h)(1)(C) of the Communications Act of 1934, as amended,[45] and

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[41] Must-Carry Complaint at Exhibits B & C. Regardless of Cablevision's argument that WRNN's right to mandatory carriage did not vest until September 14, 2006, it is now clear that Cablevision should carry WRNN-DT on its systems pursuant to the *WRNN-DT Modification Order*, this Order, and our rules. *See* 47 C.F.R. §§ 76.55, 76.61.

[42] *See* Opposition to Must-Cary Complaint at 5-7.

[43] *See* Reply to Opposition to Must-Carry Complaint at 7-8.

[44] *Id.* at 8-9.

[45] 47 U.S.C. §§ 151, 154(i), 155(c), 405, 534(h)(1)(C).

Section 1.115 of the Commission's Rules,[46] that the captioned application for review **IS DENIED**.

12. **IT IS FURTHER ORDERED** that the Petition for Stay of the above-captioned proceeding filed by Cablevision Systems Corporation on June 26, 2006, **IS DISMISSED** as moot.

13. **IT IS FURTHER ORDERED**, that the must carry complaint filed by WRNN License Company, LLC on September 14, 2006, (CSR-7053-M) **IS GRANTED** pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended.[47] Cablevision Systems Corporation **IS ORDERED** to commence carriage of WRNN-DT on its cable systems serving Nassau County, including the system that serves certain communities in Suffolk County (PSID 003146), sixty (60) days from the date on which WRNN License Company, LLC provides the necessary specialized equipment to receive a good quality signal at Cablevision's principal headend.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[46] 47 C.F.R. § 1.115.

[47] 47 U.S.C. § 534(d)(3).

JOINT STATEMENT OF COMMISSIONER MICHAEL J. COPPS AND COMMISSIONER JONATHAN S. ADELSTEIN DISSENTING

In the Matter of Petition of WRNN License Company, LLC, for Modification of Television Market for WRNN-DT, Kingston, New York

Localism is our lodestar in cable market modification cases. Section 614(h)(1)C) of the Act requires the Commission to "afford particular attention to the value of localism" by taking into account factors such as: (1) historical carriage; (2) local service; (3) coverage by other local stations; and (4) local viewing patterns. In case its intent was not clear, the legislative history stressed that the Commission should act on market modification cases "consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market."[1] This reference to a station's economic market is no accident. The must-carry statute is premised on the idea that cable carriage is necessary to ensure that over-the-air broadcasters are able to maintain their local advertising base and survive in a world in which so many consumers get their television over cable. Thus, while the factors we use to assess market modification cases are flexible, our objective is not.

Historical Carriage. The plain language of the statute asks whether the station historically has been carried on systems "within" the communities in question, ***not*** whether it has been carried on sys-

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[1] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

tems "adjacent to and near" the communities. The Media Bureau's finding that WRNN historically has not been carried on systems within the communities at issue should have ended the inquiry.[2] For similar reasons, we reject the majority's view that Verizon's apparent initiation of carriage in certain communities sometime during the past fifteen months strengthens the case for "historical carriage." The majority reads the word "historically" out of the statute.

Having said that, we do not believe that historical carriage is necessarily the only key factor in the analysis. In particular, we recognize that "some stations have not had an opportunity to build a record of historical carriage for specific reasons that do not necessarily reflect a judgment as to the geography of the market involved" and that if the historic carriage factor were controlling it would "prevent weaker stations, that cable systems had previously declined to carry, from ever obtaining carriage rights."[3] But while we readily agree that the his-

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[2] *See* Bureau Order at ¶12. The one Bureau decision cited for the proposition that carriage on systems "adjacent to and near" the communities at issue could be relevant simply found that adjacent or nearby carriage is "indicative of interest in the programming" of the station — *i.e.*, indicates that the station may provide "local service" under factor two — ***not*** that nearby carriage resolves the factual issue of whether the station historically has been carried within the community itself. *See Petition of Paxson Communications for Modification of WPXD(TV)*, 13 FCC Rcd 17869, 17874 (Cable Serv. Bur. 1998).

[3] *See In Re Petition of Cablevision Systems Corp.*, 11 FCC Rcd 6453, 6473 (Cable Serv. Bur. 1996).

torical carriage factor should not be controlling, we cannot agree that it does not mean what it says.

Local Service. This factor is typically given the most attention in market modification cases, and rightfully so — if our objective is to promote localism, the nature and extent of local service are critical. Unfortunately, this factor is also the most difficult to define, usually involving a number of considerations including signal strength, geographic proximity, natural or man-made barriers, and local programming.

In WRNN's favor is the Bureau's finding that the station puts a Grade B-equivalent signal over Nassau County.[4] This is an important finding because, as the Bureau noted, the Commission found in the *NY ADI* case that Grade B coverage "is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of a particular station's signal."[5] But the Bureau, and now the majority, fails to cite the immediately preceding language: that Grade B coverage is a sound indicator of a station's economic reach "in the absence of other determinative market facts" such as "where there is a terrain obstacle such as a mountain range or a significant body of water."[6]

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[4] Also in WRNN's favor, as noted above, is the fact that its signal is being carried by cable systems in adjacent and nearby — and apparently in the case of Verizon, overlapping — cable communities.

[5] *See* Bureau Order at ¶ 14, citing *NY ADI Order*, 12 FCC Rcd 12262, 12271 (1997).

[6] *See NY ADI Order*, 12 FCC Rcd at 12271.

This omission is all the more puzzling because the *NY ADI* case involved the question of whether WRNN and other New York market broadcast stations were entitled to carriage on Cablevision and other cable systems in the New York metropolitan area. In that decision, the Commission noted "the importance of geographic features such as expansive waterways like the Hudson River and the Long Island Sound and the interposition of Manhattan in the epicenter of the market with its extremely congested infrastructure, that act to remove communities from one another."[7] Accordingly, the Commission divided the New York market into four "subzones" as part of its market modification analyses: (1) Northern and Central New Jersey; (2) New York City; (3) Long Island; and (4) Upstate New York/Fairfield County, CT.[8]

On appeal, the Second Circuit Court of Appeals affirmed the Commission's findings:

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[7] *See id.* at 12268. Indeed, in the underlying Order addressing another station, the Commission stated: "We also note that while WHAI-TV provides Grade B service to some of the Long Island communities named in the petition, the intervention of Long Island Sound between these communities and the Bridgeport sites of the station appears to be a logical boundary to its market area and validates the absence of audience and historic carriage as appropriate market defining evidence." *See In Re Cablevision,* 11 FCC Rcd at 6453, 6478 (1996).

[8] *See NY ADI Order,* 12 FCC Rcd at 12268. The underlying Bureau Order found that WRNN was separated "by geography and terrain" from the Long Island cable systems on which it was seeking access. *See* 11 FCC Rcd at 6480.

> With respect to its geographic make-up, not only does the New York ADI [now DMA] span four states, but the counties within this area are not contained in one contiguous land mass. Rather, they are separated by several bodies of water, including the Hudson River and Long Island Sound. New York City acts as a natural boundary because its complicated and congested traffic patterns make it difficult for residents at one end of the ADI to access communities at the other end. The ADI therefore has an obvious tendency to break itself up into smaller divisions reflecting localized regions. New York City serves as the "hub," with its stations' programming and advertising being of widespread interest across the ADI. Outlying communities are the "spokes," with their stations generally showing programming and advertising of interest only to viewers in relatively close proximity to that community.[9]

Those market realities have not changed since 1998. All that has changed is that WRNN now operates from a transmitter site well south of its old transmitter site (hence the improved signal strength over Long Island) and moved its main studio from Kingston, its community of license, to New York City.[10] But that does not transform WRNN from a Kingston "spoke" station into a New York City "hub"

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[9] *See WLNY-TV, WRNN-TV, et al. v. FCC*, 163 F.3d 137, 144 (2d Cir. 1998).

[10] This case is a good example of how the Commission's relaxation of its main studio rules have gone too far. A Kingston resident who wanted to visit WRNN's main studio would have to travel over 100 miles. *See* Cablevision Opposition to WRNN Petition at 21.

station. WRNN is licensed to serve the residents of Kingston, not New York City or the New York region. The question from a localism perspective is whether the cable communities are in the same "local market" as the station's community of license. A station's Grade B contour is often a good proxy for that determination. Here, given the unique geography of the New York market and the distances involved,[11] we believe it is not.

Regarding the issue of whether WRNN provides local programming of particular relevance to Long Island viewers, the record contains voluminous and conflicting evidence. For instance, WRNN argues that it carries fourteen hours of programming per week of specific interest to the Long Island cable communities; Cablevision argues that it actually carries less than an hour. The Bureau, after reviewing all of the evidence, rejected WRNN's arguments, finding that the record "does not indicate that much of WRNN-DT's programming concerning Long Island focuses on those communities in Nassau County."[12] The Bureau went on to find that this case is consistent with the Second Circuit's holding in *WLNY* that the outlying "spoke" communities in Nassau County and the Hudson Valley are connected by the "hub" of New York City, and that that

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[11] Driving distances between Kingston and the Cable Communities range from 111 miles to 195 miles and average 151 miles. Straight-line distances — ignoring the Long Island Sound — range from nearly 79 miles to over 119 miles and average nearly 94 miles. *See* Cablevision Opposition to WRNN Petition at 12-13.

[12] *See* Bureau Order at ¶16.

"spoke" market programming is generally not of interest to other "spoke" communities.[13]

The majority, however, finds that the Bureau "erred in its analysis" by finding that the record did not support a finding of significant programming to the Long Island communities. As proof, the majority simply cites to an exhibit filed by WRNN without any explanation how the Bureau "erred" or any attempt to address the contradictory evidence. We would have affirmed the Bureau on this point.

Overall, this factor is a close call. In the end, we believe that the unique characteristics of the New York market coupled with the Bureau's finding regarding the lack of locally-focused programming outweigh the Grade B presumption of local service.

Coverage by Other Qualified Stations. We agree that the presence of other local stations should not keep an otherwise qualified local station from extending its market. But we do not see a statutory basis for a finding that this factor can ***only*** be relevant to enhance a station's claim — *i.e.*, where it can be shown that other stations do not serve the communities at issue. The Commission has held that it could also be relevant where a station clearly does not provide local programming and other nearby stations do.[14] In any event, this is not such a case and we assign little weight to this factor.

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[13] *Id.*

[14] *See NY ADI Order*, 12 FCC Rcd at 12266-67; *In Re Cablevision*, 11 FCC Rcd at 6475, citing *Petition of Time Warner Cable*, 10 FCC Rcd 8625 (1995).

Viewership. Like the majority, we recognize that many stations seeking market modifications — especially new stations or those with specialized formats — will not have significant levels of viewership in the communities at issue. Although there may be cases where viewership is relevant, we generally believe it will not be outcome determinative. Here, we agree that while WRNN's viewership levels are low, that factor should not be afforded significant weight.[15]

In sum, we find that none of the statutory factors supports the addition of the Long Island communities to WRNN's local market. There is a point at which the concept of a "local market" reaches the breaking point and expanding it further will actually damage the localism interests we are trying to serve. For the sake of the people of Kingston, we hope we have not reached that point here.

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[15] *See* Bureau Order at ¶18.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * *

Docket Number(s): 07-5553-ag

* * *

CABLEVISION SYSTEMS CORP., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al., Respondents.

* * *

[UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DEC 09, 2009
Catherine O'Hagan Wolfe, Clerk]

ORDER

Before: John M. Walker, Jr., José A. Cabranes, Reena Raggi, *Circuit Judges*.

IT IS HEREBY ORDERED that the motion by Petitioner Cablevision Systems Corp. to stay the mandate pending the filing and disposition of a petition for writ of *certiorari* is GRANTED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

by

/s/
Joy Fallek, Administrative Attorney

Dec. 09, 2009

Date

APPENDIX E

[UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED OCT 29, 2009
Catherine O'Hagan Wolfe, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 29th day of October, two thousand nine.

07-5553-ag

CABLEVISION SYSTEMS CORPORATION,
Petitioner,

— v. —

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondents,

WRNN LICENSE COMPANY, LLC,
Intervenor.

Petitioner Cablevision Systems Corporation having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members

of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By:

/s/
Frank Perez, Deputy Clerk

APPENDIX F

UNITED STATES CODE (2006)

TITLE 47

TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

* * *

§ 534. Carriage of local commercial television signals

(a) Carriage obligations

Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b) of this title.

(b) Signals required

(1) In general

(A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.

(B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television

stations, up to one-third of the aggregate number of usable activated channels of such system.

(2) Selection of signals

Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (1), the cable operator shall have discretion in selecting which such stations shall be carried on its cable system, except that —

(A) under no circumstances shall a cable operator carry a qualified low power station in lieu of a local commercial television station; and

(B) if the cable operator elects to carry an affiliate of a broadcast network (as such term is defined by the Commission by regulation), such cable operator shall carry the affiliate of such broadcast network whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (in effect on January 1, 1991), or any successor regulation thereto, is closest to the principal headend of the cable system.

(3) Content to be carried

(A) A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking in-

ternal or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends.

(B) The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991), or any successor regulations thereto.

(4) Signal quality

(A) Nondegradation; technical specifications

The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.

(B) Advanced television

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a

proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

(5) Duplication not required

Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation). If a cable operator elects to carry on its cable system a signal which substantially duplicates the signal of another local commercial television station carried on the cable system, or to carry on its system the signals of more than one local commercial television station affiliated with a particular broadcast network, all such signals shall be counted toward the number of signals the operator is required to carry under paragraph (1).

(6) Channel positioning

Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the

cable operator. Any dispute regarding the positioning of a local commercial television station shall be resolved by the Commission.

(7) Signal availability

Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 543(b)(3) of this title.

(8) Identification of signals carried

A cable operator shall identify, upon request by any person, the signals carried on its system in fulfillment of the requirements of this section.

(9) Notification

A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. The notification provisions of this

paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

(10) Compensation for carriage

A cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section, except that—

(A) any such station may be required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system;

(B) a cable operator may accept payments from stations which would be considered distant signals under section 111 of title 17 as indemnification for any increased copyright liability resulting from carriage of such signal; and

(C) a cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal of any local commercial television station carried in fulfillment of the requirements of this section, through, but not beyond, the date of expiration of an agreement thereon between a cable operator and a local commercial television station entered into prior to June 26, 1990.

(c) Low power station carriage obligation

(1) Requirement

If there are not sufficient signals of full power local commercial television stations to fill the channels set aside under subsection (b) of this section—

(A) a cable operator of a cable system with a capacity of 35 or fewer usable activated channels shall be required to carry one qualified low power station; and

(B) a cable operator of a cable system with a capacity of more than 35 usable activated channels shall be required to carry two qualified low power stations.

(2) Use of public, educational, or government channels

A cable operator required to carry more than one signal of a qualified low power station under this subsection may do so, subject to approval by the franchising authority pursuant to section 531 of this title, by placing such additional station on public, educational, or governmental channels not in use for their designated purposes.

(d) Remedies

(1) Complaints by broadcast stations

Whenever a local commercial television station believes that a cable operator has failed to meet its obligations under this section, such station shall notify the operator, in writing, of the alleged failure and identify its reasons for believing that the cable operator is obligated to carry the signal of such station or has otherwise failed to comply with the channel positioning or repositioning or other requirements of this section.

The cable operator shall, within 30 days of such written notification, respond in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning and other requirements of this section. A local commercial television station that is denied carriage or channel positioning or repositioning in accordance with this section by a cable operator may obtain review of such denial by filing a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.

(2) Opportunity to respond

The Commission shall afford such cable operator an opportunity to present data and arguments to establish that there has been no failure to meet its obligations under this section.

(3) Remedial actions, dismissal

Within 120 days after the date a complaint is filed, the Commission shall determine whether the cable operator has met its obligations under this section. If the Commission determines that the cable operator has failed to meet such obligations, the Commission shall order the cable operator to reposition the complaining station or, in the case of an obligation to carry a station, to commence carriage of the station and to continue such carriage for at least 12 months. If the Commission determines that the cable operator

has fully met the requirements of this section, it shall dismiss the complaint.

(e) Input selector switch rules abolished

No cable operator shall be required—

(1) to provide or make available any input selector switch as defined in section 76.5(mm) of title 47, Code of Federal Regulations, or any comparable device; or

(2) to provide information to subscribers about input selector switches or comparable devices.

(f) Regulations by Commission

Within 180 days after October 5, 1992, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section. Such implementing regulations shall include necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations.

(g) Sales presentations and program length commercials

(1) Carriage pending proceeding

Pending the outcome of the proceeding under paragraph (2), nothing in this chapter shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or video programming service that is predominantly utilized for the transmission of sales presentations or program length commercials.

(2) Proceeding concerning certain stations

Within 270 days after October 5, 1992, the Commission, notwithstanding prior proceedings to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity, shall complete a proceeding in accordance with this paragraph to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity. In conducting such proceeding, the Commission shall provide appropriate notice and opportunity for public comment. The Commission shall consider the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming. In the event that the Commission concludes that one or more of such stations are serving the public interest, convenience, and necessity, the Commission shall qualify such stations as local commercial television stations for purposes of subsection (a) of this section. In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience, and necessity, the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely because their programming consisted predominantly of

sales presentations or program length commercials.

(h) Definitions

(1) Local commercial television station

(A) In general

For purposes of this section, the term "local commercial television station" means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section 535(*l*)(1) of this title, licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.

(B) Exclusions

The term "local commercial television station" shall not include—

(i) low power television stations, television translator stations, and passive repeaters which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto;

(ii) a television broadcast station that would be considered a distant signal under section 111 of title 17, if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system; or

(iii) a television broadcast station that does not deliver to the principal headend of a cable

system either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, if such station does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.

(C) Market determinations

(i) For purposes of this section, a broadcasting station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns, except that, following a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

(ii) In considering requests filed pursuant to clause (i), the Commission shall afford particular attention to the value of localism by taking into account such factors as—

(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

(II) whether the television station provides coverage or other local service to such community;

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

(iii) A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this subparagraph.

(iv) Within 120 days after the date on which a request is filed under this subparagraph (or 120 days after February 8, 1996, if later), the Commission shall grant or deny the request.

(2) Qualified low power station

The term "qualified low power station" means any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations, only if—

(A) such station broadcasts for at least the minimum number of hours of operation required by the Commission for television broadcast sta-

tions under part 73 of title 47, Code of Federal Regulations;

(B) such station meets all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license;

(C) such station complies with interference regulations consistent with its secondary status pursuant to part 74 of title 47, Code of Federal Regulations;

(D) such station is located no more than 35 miles from the cable system's headend, and delivers to the principal headend of the cable system an over-the-air signal of good quality, as determined by the Commission;

(E) the community of license of such station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas, ranked by population, as determined by the Office of Management and Budget on June 30, 1990, and the population of

such community of license on such date did not exceed 35,000; and

(F) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system. Nothing in this paragraph shall be construed to change the secondary status of any low power station as provided in part 74 of title 47, Code of Federal Regulations, as in effect on October 5, 1992.

§ 535. Carriage of noncommercial educational television

(a) Carriage obligations

In addition to the carriage requirements set forth in section 534 of this title, each cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section.

(b) Requirements to carry qualified stations

(1) General requirement to carry each qualified station

Subject to paragraphs (2) and (3) and subsection (e) of this section, each cable operator shall carry, on the cable system of that cable operator, any qualified local noncommercial educational television station requesting carriage.

(2) Systems with 12 or fewer channels

(A) Notwithstanding paragraph (1), a cable operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of one qualified local noncommercial educational television station; except that a cable operator of such a system shall comply with subsection (c) of this section and may, in its discretion, carry the signals of other qualified noncommercial educational television stations.

(B) In the case of a cable system described in subparagraph (A) which operates beyond the presence of any qualified local noncommercial educational television station—

(i) the cable operator shall import and carry on that system the signal of one qualified noncommercial educational television station;

(ii) the selection for carriage of such a signal shall be at the election of the cable operator; and

(iii) in order to satisfy the requirements for carriage specified in this subsection, the cable operator of the system shall not be required to remove any other programming service actually provided to subscribers on March 29, 1990; except that such cable operator shall use the first channel available to satisfy the requirements of this subparagraph.

(3) Systems with 13 to 36 channels

(A) Subject to subsection (c) of this section, a cable operator of a cable system with 13 to 36 usable activated channels—

(i) shall carry the signal of at least one qualified local noncommercial educational television station but shall not be required to carry the signals of more than three such stations, and

(ii) may, in its discretion, carry additional such stations.

(B) In the case of a cable system described in this paragraph which operates beyond the presence of any qualified local noncommercial educational television station, the cable operator shall import and carry on that system the signal

of at least one qualified noncommercial educational television station to comply with subparagraph (A)(i).

(C) The cable operator of a cable system described in this paragraph which carries the signal of a qualified local noncommercial educational station affiliated with a State public television network shall not be required to carry the signal of any additional qualified local noncommercial educational television stations affiliated with the same network if the programming of such additional stations is substantially duplicated by the programming of the qualified local noncommercial educational television station receiving carriage.

(D) A cable operator of a system described in this paragraph which increases the usable activated channel capacity of the system to more than 36 channels on or after March 29, 1990, shall, in accordance with the other provisions of this section, carry the signal of each qualified local noncommercial educational television station requesting carriage, subject to subsection (e) of this section.

(c) Continued carriage of existing stations

Notwithstanding any other provision of this section, all cable operators shall continue to provide carriage to all qualified local noncommercial educational television stations whose signals were carried on their systems as of March 29, 1990. The requirements of this subsection may be waived with respect to a particular cable operator and a particular such station, upon the written consent of the cable operator and the station.

(d) Placement of additional signals

A cable operator required to add the signals of qualified local noncommercial educational television stations to a cable system under this section may do so, subject to approval by the franchising authority pursuant to section 531 of this title, by placing such additional stations on public, educational, or governmental channels not in use for their designated purposes.

(e) Systems with more than 36 channels

A cable operator of a cable system with a capacity of more than 36 usable activated channels which is required to carry the signals of three qualified local noncommercial educational television stations shall not be required to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television station requesting carriage. Substantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services.

(f) Waiver of nonduplication rights

A qualified local noncommercial educational television station whose signal is carried by a cable operator shall not assert any network nonduplication rights it may have pursuant to section 76.92 of title 47, Code of Federal Regulations, to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that cable operator.

(g) Conditions of carriage

(1) Content to be carried

A cable operator shall retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the cable operator.

(2) Bandwidth and technical quality

A cable operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and shall carry the signal of each qualified local noncommercial educational television station without material degradation.

(3) Changes in carriage

The signal of a qualified local noncommercial educational television station shall not be repositioned by a cable operator unless the cable operator, at least 30 days in advance of such repositioning, has provided written notice to the station and all subscribers of the cable system. For purposes of this paragraph, repositioning in-

cludes (A) assignment of a qualified local noncommercial educational television station to a cable system channel number different from the cable system channel number to which the station was assigned as of March 29, 1990, and (B) deletion of the station from the cable system. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

(4) Good quality signal required

Notwithstanding the other provisions of this section, a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission.

(5) Channel positioning

Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the qualified local noncommercial educational television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a qualified local noncommercial educational television station shall be resolved by the Commission.

(h) Availability of signals

Signals carried in fulfillment of the carriage obligations of a cable operator under this section shall be available to every subscriber as part of the cable system's lowest priced service tier that includes the retransmission of local commercial television broadcast signals.

(i) Payment for carriage prohibited

(1) In general

A cable operator shall not accept monetary payment or other valuable consideration in exchange for carriage of the signal of any qualified local noncommercial educational television station carried in fulfillment of the requirements of this section, except that such a station may be required to bear the cost associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system.

(2) Distant signal exception

Notwithstanding the provisions of this section, a cable operator shall not be required to add the signal of a qualified local noncommercial educational television station not already carried under the provision of subsection (c) of this section, where such signal would be considered a distant signal for copyright purposes unless such station indemnifies the cable operator for any increased copyright costs resulting from carriage of such signal.

(j) Remedies

(1) Complaint

Whenever a qualified local noncommercial educational television station believes that a cable operator of a cable system has failed to comply with the signal carriage requirements of this section, the station may file a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to comply with such requirements and state the basis for such allegations.

(2) Opportunity to respond

The Commission shall afford such cable operator an opportunity to present data, views, and arguments to establish that the cable operator has complied with the signal carriage requirements of this section.

(3) Remedial actions; dismissal

Within 120 days after the date a complaint is filed under this subsection, the Commission shall determine whether the cable operator has complied with the requirements of this section. If the Commission determines that the cable operator has failed to comply with such requirements, the Commission shall state with particularity the basis for such findings and order the cable operator to take such remedial action as is necessary to meet such requirements. If the Commission determines that the cable operator has fully complied with such requirements, the Commission shall dismiss the complaint.

(k) Identification of signals

A cable operator shall identify, upon request by any person, those signals carried in fulfillment of the requirements of this section.

(*l*) Definitions

For purposes of this section—

(1) Qualified noncommercial educational television station

The term "qualified noncommercial educational television station" means any television broadcast station which—

(A)(i) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association; and

(ii) has as its licensee an entity which is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in section 396(k)(6)(B) of this title; or

(B) is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.

Such term includes (I) the translator of any noncommercial educational television station with five watts or higher power serving the franchise

area, (II) a full-service station or translator if such station or translator is licensed to a channel reserved for noncommercial educational use pursuant to section 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto, and (III) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial educational stations.

(2) Qualified local noncommercial educational television station

The term "qualified local noncommercial educational television station" means a qualified noncommercial educational television station—

(A) which is licensed to a principal community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (as in effect on March 29, 1990), or any successor regulations thereto, is within 50 miles of the principal headend of the cable system; or

(B) whose Grade B service contour, as defined in section 73.683(a) of such title (as in effect on March 29, 1990), or any successor regulations thereto, encompasses the principal headend of the cable system.

Supreme Court, U.S.
FILED
MAR 26 2010
OFFICE OF THE CLERK

No. 09-901

In the Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Washington, D.C. 20554

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's decision to restore certain Long Island communities served by Cablevision Systems Corporation to the market of television station WRNN, thereby entitling the station to carriage on Cablevision's cable systems in those communities, was consistent with the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 47 U.S.C. 534, and the Constitution.

2. Whether this Court's decisions in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994), and *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997), which upheld the must-carry requirement in 47 U.S.C. 534 against a facial First Amendment challenge, should be overruled.

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In the Supreme Court of the United States

No. 09-901

CABLEVISION SYSTEMS CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 570 F.3d 83. The order of the Federal Communications Commission (FCC or Commission) (Pet. App. 47a-68a) is reported at 22 F.C.C.R. 21,054. The order of the FCC's Media Bureau (Pet. App. 27a-46a) is reported at 21 F.C.C.R. 5952.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2009. A petition for rehearing was denied on October 29, 2009 (Pet. App. 70a-71a). The petition for a writ of certiorari was filed on January 27, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102-385, 106 Stat. 1460, requires a cable system with more than 300 subscribers to "carry * * * the signals of local commercial television stations" that operate "within the same television market as the cable system." 47 U.S.C. 534(a) and (h)(1)(A). "Congress enacted the 1992 Cable Act after conducting three years of hearings on the structure and operation of the cable television industry." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 632 (1994) (*Turner I*). Congress found that there was "a substantial likelihood that [without a must-carry requirement,] additional local broadcast signals will be deleted, repositioned, or not carried," and that "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." *Id.* at 634 (quoting 1992 Cable Act § 2(a)(15) and (16), 106 Stat. 1462).

In *Turner I* and *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*), this Court upheld the must-carry requirement against a facial First Amendment challenge. In *Turner I*, the Court held that the must-carry requirement was content-neutral and subject to intermediate scrutiny. See 512 U.S. at 661-662. In *Turner II*, the Court applied that standard and held that the statute was constitutional because it was narrowly tailored to advance the government's important interests in "preserving the benefits of free, over-the-air local broadcast television" and "promoting the widespread dissemination of information from a multiplicity of sources." 520 U.S. at 189.

2. Under 47 U.S.C. 534(h)(1)(C)(i), a broadcast television station is entitled to carriage on cable systems located within the station's market, as defined by "commercial publications which delineate television markets based on viewing patterns." To determine a television station's market for purposes of this provision, the Commission "relies on the commercial publications of Nielsen Market Research that divide the nation into a series of coterminous geographic 'Designated Market Areas' ('DMAs') based on viewership patterns." Pet. App. 3a (citing 47 C.F.R. 76.55(e)(2)). If a television station and a cable system are located in the same DMA, then the cable system is presumptively required to carry the station's broadcast signal.

The must-carry statute authorizes the Commission to adjust a television station's market—and therefore the geographic extent of its must-carry rights—upon written request. 47 U.S.C. 534(h)(1)(C). The Commission may "include additional communities within [a station's] television market or exclude communities from such station's television market to better effectuate the purposes" of the statute. 47 U.S.C. 534(h)(1)(C)(i). In exercising this market-modification authority, the Commission is required to

> tak[e] into account such factors as—(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; (II) whether the television station provides coverage or other local service to such community; (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides

> carriage or coverage of sporting and other events of interest to the community; and (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

47 U.S.C. 534(h)(1)(C)(ii).

3. WRNN is a television station licensed to Kingston, New York, a community within the New York DMA. See Pet. App. 7a. Petitioner operates cable systems on Long Island that also lie within the New York DMA. *Ibid.* Because of this overlap, WRNN is presumptively entitled to carriage on petitioner's Long Island systems under Section 534(h)(1)(C)(i).

In 1997, the Commission (at petitioner's request) exercised its market-modification authority to exclude communities on Long Island from WRNN's television market. See *Market Modifications & the N.Y. Area of Dominant Influence*, 12 F.C.C.R. 12,262 (1997). In doing so, the Commission emphasized that those Long Island communities could not at that time receive a sufficiently strong signal from WRNN to be considered part of the station's geographic market. See *id.* at 12,271-12,272 (¶ 19). The Second Circuit affirmed the FCC's order. See *WLNY-TV, Inc.* v. *FCC*, 163 F.3d 137 (1998).

By 2006, WRNN had switched to all-digital operations and had relocated its transmitter closer to Manhattan, allowing it to broadcast a stronger signal to Long Island. Pet. App. 8a-9a. Based on its stronger signal and other factors, WRNN asked the Commission to restore Long Island to its television market. *Id.* at 9a. In May 2006, the Commission's Media Bureau granted WRNN's request to restore communities in Nassau County and western Suffolk County to its geographic market, *id.* at 27a-46a, while rejecting the sta-

tion's request with respect to "geographically distant" communities further out on Long Island that were not adequately served by the station's over-the-air signal, *id.* at 36a-37a. On internal agency review, the Commission upheld the Bureau's decision. *Id.* at 47a-60a.

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-26a. The court found "no constitutional or legal error in the FCC's decision." *Id.* at 3a. The court held that the Commission had reasonably applied the factors set forth in 47 U.S.C. 534(h)(1)(C)(ii) in modifying WRNN's television market. See Pet. App. 11a-16a. The court rejected petitioner's argument that the Commission had violated the market-modification provision by failing to account for the goal of "localism" or the "purposes" of the must-carry regime. *Id.* at 17a-19a. The court concluded that restoring the Long Island communities to WRNN's television market would not necessarily reduce the local programming targeted to Kingston, *id.* at 17a, and that the agency's action did not violate the statute, given that "the default rule is that WRNN must be carried by cable operators throughout the New York City DMA." *Id.* at 18a.

The court of appeals rejected petitioner's "as-applied" First Amendment challenge to the market-modification order. Pet. App. 19a. The court held that the Commission's order was content-neutral, and it had "no trouble in concluding that the order 'advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further these interests.'" *Id.* at 22a-24a (quoting *Turner II*, 520 U.S. at 189). The court further held that the market-modification order did not result in a per se taking of petitioner's property, and it noted that petitioner had

not offered any evidence to support its claim that a regulatory taking had occurred. See *id.* at 25a-26a.

ARGUMENT

The Commission reasonably analyzed the pertinent factors under Section 534(h)(1)(C) in exercising its market-modification authority in this case, and it did so in a manner consistent with the First Amendment. The court of appeals' decision upholding the Commission's fact-specific analysis of WRNN's relationship to the Long Island communities served by petitioner does not conflict with the decision of any other court or present a question of importance warranting this Court's consideration. Although petitioner attempts to supplement its fact-bound challenges to the agency's market-specific decision by launching a facial attack on the entire must-carry regime, that broader claim is jurisdictionally barred, waived, and unsupported by the thin record in this case.

1. Petitioner contends that the Commission's decision is not "consistent with the must-carry statute." Pet. 32. That fact-bound claim, which was correctly rejected by the court of appeals, does not warrant this Court's review.

Section 534(h)(1)(C) authorizes the Commission to modify television markets to "better effectuate the purposes of" Section 534. In deciding whether to modify a television station's market, the Commission must "afford particular attention to the value of localism by taking into account such factors as" (1) whether television stations in the same area have historically been carried on the relevant cable systems, (2) whether the television station at issue "provides coverage or other local service to such community," (3) whether other television stations provide news or other coverage of local interest,

and (4) "evidence of viewing patterns" within the community. 47 U.S.C. 534(h)(1)(C)(ii).

In this case, the Commission balanced the statutory factors and concluded that petitioner's Long Island communities should be restored to WRNN's presumptive market. See Pet. App. 39a-45a (Bureau decision); *id.* at 51a-53a (Commission decision). The Bureau emphasized the strong signal that WRNN now places over Long Island. See *id.* at 44a. The Commission noted as well WRNN's "substantial record" of Long Island programming and the fact that WRNN had begun to be carried by petitioner's competitors on Long Island. *Id.* at 52a. When evaluating a market-modification request, the agency is merely required to "consider a number of factors"; the statute does not dictate how much (if any) weight each factor must receive. *Id.* at 15a-16a (citing *Time Warner Entm't Co.* v. *FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995), cert. denied, 516 U.S. 1112 (1996)). The court of appeals correctly found that the Commission had discharged its duty to consider the relevant criteria (*id.* at 16a) and that its decision was supported by "substantial evidence" in the record (*id.* at 13a).

Petitioner contends that the Commission's market-modification order "will do nothing to further the value of localism" on Long Island and will give WRNN "an incentive to neglect its Kingston audience." Pet. 32-33. As the court of appeals observed, however, this contention rests on a "false premise." Pet. App. 17a. Not only was there "substantial evidence" in the agency record to support the Commission's conclusion that WRNN aired "significant Long Island-targeted programming" (*id.* at 12a-13a), but WRNN can adjust its non-local programming so as to "increase Long Island-targeted program-

ming without decreasing Kingston-targeted programming," *id.* at 17a.

Petitioner argues that the market-modification order does not "better effectuate" the purposes of must-carry because, in petitioner's view, the order made WRNN "better off" by permitting the station to be carried in communities "many * * * miles away from its traditional over-the-air service area." Pet. 33-34. WRNN's presumptive market, however, is defined by the 1992 Cable Act, which specifies that a station's market is determined in the first instance by "commercial publications which delineate television markets based on viewing patterns." 47 U.S.C. 534(h)(1)(C)(i). In this case, because WRNN's community of license and petitioner's Long Island communities are within the same DMA, "the default rule is that WRNN must be carried by cable operators throughout the New York City DMA." Pet. App. 18a. Contrary to petitioner's suggestion, the Commission's order therefore did not confer a special benefit on WRNN, but simply restored part of its default market under the must-carry statute.

Moreover, as the court of appeals concluded, the purposes of Section 534 include "'preserv[ing] the benefits of free, over-the-air television' and 'promot[ing] the widespread dissemination of information from a multiplicity of sources.'" Pet. App. 19a (quoting *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 662 (1994) (*Turner I*)). Those purposes are not "served only by granting broadcasters the minimum must-carry coverage necessary for survival," nor are they "frustrated by actions which result in a station's greater prosperity." *Ibid.*

2. Petitioner contends that the Court's reasoning in *Turner I* and *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*) cannot support "com-

pelled carriage of WRNN here." Pet. 25. Because the court of appeals' rejection of that as-applied constitutional challenge turned on the particular facts and circumstances of this case and does not conflict with the decision of any other court, further review of this claim is not warranted. In any event, petitioner's as-applied challenge lacks merit.

a. Petitioner's as-applied challenge fails at the threshold because it misapprehends the proper First Amendment inquiry. When intermediate scrutiny applies (as it does here, see *Turner I*, 512 U.S. at 662), a party cannot establish a First Amendment violation simply by demonstrating that "allowing an exception in [its] particular case will not threaten important government interests." *United States* v. *Albertini*, 472 U.S. 675, 688 (1985), see *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-297 (1984). Such case-specific showings do not warrant "as applied" relief for the parties advancing them; statutes subject to intermediate scrutiny "must be evaluated in terms of their general effect." *Albertini*, 472 U.S. at 689; see *A-R Cable Servs.-ME, Inc.* v. *FCC*, Civ. No. 95-134-P-H, 1995 WL 283861, at *4 (D. Me. May 10, 1995) ("The [must-carry] statute's constitutionality must be assessed—as is happening in *Turner Broadcasting*—according to the general information available to support the legislative judgment.").

Even if the kind of party-specific First Amendment challenge petitioner asserts were permissible, it would fail. Petitioner first argues that application of must-carry requirements here is inconsistent with *Turner* because WRNN has "*no* over-the-air audience" and "[t]here is no important governmental interest in saving a broadcast signal for an over-the-air audience that does

not exist." Pet. 25-26. Contrary to that contention, however, the record shows that WRNN's digital signal reaches the Long Island communities at issue (Pet. App. 41a-42a); that the station has an audience in those communities, (*id.* at 45a); and that the station airs programming directed to Long Island residents (*id.* at 42a-44a, 52a) and receives numerous telephone calls from viewers in that region (*id.* at 45a). In addition, this Court in *Turner II*, rejected "a minimum viewership standard" for must-carry eligibility as a reasonable alternative and deferred to the "deliberate congressional choice to adopt the present levels of protection." 520 U.S. at 218-219.

As the Commission found, moreover, the market-modification order ensures that WRNN "(1) remains a viable option for viewers who rely on free, over-the-air television service in Nassau and Suffolk counties, and (2) continues to number among the multiplicity of information sources available to viewers in those counties." Pet. App. 55a. The governmental interests implicated in this case are the same interests this Court has identified as sufficient to support the imposition of must-carry obligations on cable operators. See *Turner II*, 520 U.S. at 189-190; *Turner I*, 512 U.S. at 662-663.

Petitioner is also incorrect in arguing that the market-modification order at issue here violated the First Amendment by improperly "extend[ing] WRNN's reach." Pet. 27. On the contrary, the order merely restores a portion of the New York DMA (WRNN's presumptive television market) to the station's geographic market based on record evidence that WRNN now provides signal coverage and local service to the Long Island communities. See Pet. App. 11a-16a.

Petitioner also contends that this Court's rationale for upholding the must-carry regime forbids compelled

carriage of WRNN except where necessary to prevent financial "hardship" to the station. Pet. 27. That is incorrect. The Court in *Turner II* did not require the government to make "a showing that financial hardship will befall the particular station" seeking carriage rights in the absence of must-carry. *Ibid.* Rather, the Court found it sufficient that Congress had "substantial evidence to support its conclusion" that "the viability of a broadcast station depends to a material extent on its ability to secure cable carriage." *Turner II*, 520 U.S. at 208.

Petitioner does not dispute that cable carriage remains critical to broadcast stations' financial viability generally. It argues instead that the market-modification order in this case is unconstitutional because, in petitioner's view, carriage on petitioner's Long Island systems is not necessary to keep WRNN in business. Because petitioner did not raise that argument before the Commission, its challenge to the market-modification order on that basis is barred by 47 U.S.C. 405(a), which provides that a petition for agency reconsideration is a "condition precedent to judicial review" of any "question[] of fact or law" upon which the Commission "has been afforded no opportunity to pass." See, *e.g.*, *In re Core Commc'ns, Inc.*, 455 F.3d 267, 276 (D.C. Cir. 2006) (Courts "generally lack jurisdiction to review arguments that have not first been presented to the Commission.") (citation omitted).

In any event, even if petitioner had raised that argument before the Commission, the agency reasonably could have rejected it. In *Turner I*, this Court identified as important governmental interests the "preserv[ation] [of] the benefits of free, over-the-air local broadcast television" and the "promot[ion] [of] the widespread dissem-

ination of information from a multiplicity of sources." 512 U.S. at 662. Given those recognized interests, the First Amendment does not require that the statute be read to provide broadcasters only "the minimum must-carry coverage necessary for survival." Pet. App. 19a.

Petitioner is also incorrect in contending (Pet. 27) that must-carry requirements cannot constitutionally be applied unless a cable operator denies carriage to a broadcaster "with a view to stifling competition." To the contrary, the Court in *Turner II* recognized that the government has an important interest in "preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anti-competitive animus or rises to the level of an antitrust violation." 520 U.S. at 194. Indeed, the Court specifically rejected the argument that the government's interest could be adequately served by application of the antitrust laws or an administrative complaint procedure, under which "the station [would have] to prove facts establishing an antitrust violation" rather than "proving entitlement under must-carry." *Id.* at 223. That analysis refutes petitioner's assertion that, with each application of the must-carry statute, "the Government must prove that anticompetitive motives drove the specific carriage judgment that the Government seeks to override." Pet. 28.

Finally, petitioner argues that "*Turner*'s rationale simply ceases to function where a cable operator is subject to competition." Pet. 28. Petitioner asserts that it faces "robust competition from Verizon's fiber-optic cable television service." *Ibid.* The administrative record indicates, however, that at the time of the Commission's market-modification order, Verizon offered television service in only three of the 79 Long Island communities

affected by that order. See Pet. App. 52a n.15. And petitioner did not provide the agency with any Long Island-specific market-share data to substantiate its claim of "robust competition." Thus, to the extent that information concerning competition within a particular market is relevant to the constitutionality of a particular application of the must-carry statute, this case comes to the Court without such evidence.

b. Section 534(h)(1)(C)(ii) provides that "[i]n considering requests [to modify television markets], the Commission shall afford particular attention to the value of localism by taking into account such factors as * * * whether the television station provides coverage or other local service to such community." 47 U.S.C. 534(h)(1)(C)(ii). Petitioner contends that the FCC's consideration of that factor in this case rendered its market-modification order content-based and therefore subject to strict First Amendment scrutiny. Pet. 29-32. Petitioner did not argue before the Commission, however, that consideration of WRNN's programming for the purpose of determining the station's geographic market would trigger strict scrutiny and violate the First Amendment. To the contrary, petitioner urged the Commission to treat WRNN's purported *lack* of Long Island-oriented programming as a ground for denying the station's market-modification request. See Pet. App. 43a. Petitioner's current contention that strict scrutiny applies therefore is not properly before the Court. See 47 U.S.C. 405(a).

Even if petitioner had preserved that argument, this case would present a poor vehicle for considering it. As the court of appeals explained, "WRNN's local programming was an inconsequential factor in the FCC's ultimate decision." Pet. App. 23a. Indeed, the agency's

Media Bureau and the full Commission "reached different conclusions on this factor, yet both agreed that the totality of the circumstances no longer justified excluding Long Island communities from WRNN's presumptive" market. *Ibid.* The Court should not decide whether FCC consideration of the local-programming factor triggers strict scrutiny in a case where that factor was "inconsequential" to the outcome.

In all events, the court of appeals correctly concluded that the Commission's "order is content neutral and deserving of intermediate scrutiny." Pet. App. 23a.[1] "[T]he 'principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys.'" *Turner I*, 512 U.S. at 642 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)) (ellipsis and brackets omitted). The Commission did not consider WRNN's programming to determine whether it agreed or disagreed with the "ideas or views expressed." *Id.* at 643. Rather, as the court of appeals observed, the Long Island communities are part of WRNN's presumptive market, and the Commission "considered the amount of local programming provided by WRNN only * * * in assessing the continued need to restrict [that] presumptive market defined solely by geography." Pet. App. 23a. The statute does not direct

[1] Contrary to petitioner's contention, the court of appeals did not hold that "consideration of content triggers strict scrutiny only when there is an 'illicit content-based motive.'" Pet. 30 (quoting Pet. App. 23a). Rather, the court concluded that such a motive may be an "[a]dditional[]" reason to apply strict scrutiny, but noted that in this case petitioner had "not alleged, much less proven that the restoration of the Long Island communities to WRNN's market under these circumstances was based on some illicit content-based motive." Pet. App. 23a.

consideration of local programming in order to promote it, but rather as one of a number of factors that provide reasonable guideposts to assess the reach of a station's market. See 47 U.S.C. 534(h)(1)(C)(ii).

3. Petitioner also contends that "sweeping industry changes since the 1990s" have undermined the rationale of the *Turner* decisions, and that the Court should therefore overrule those decisions and hold that the must-carry statute is facially invalid. Pet. 16-24. That claim is not properly before the Court, and, even if it were, this case would present a poor vehicle for resolving it.

a. The 1992 Cable Act provides that, "[n]otwithstanding any other provision of law, any civil action challenging the constitutionality of section 534 * * * shall be heard by a district court of three judges convened pursuant to * * * section 2284 of Title 28." 47 U.S.C. 555(c)(1). Petitioner's petition for review of the Commission's decision is a "civil action" through which petitioner now seeks to "challeng[e] the constitutionality of section 534." *Ibid.* Section 402(a) of the Communications Act of 1934 gave the court of appeals jurisdiction to consider petitioner's case-specific petition for review of the FCC's order, see 47 U.S.C. 402(a); 28 U.S.C. 2342, but 47 U.S.C. 555(c)(1) operates "[n]otwithstanding any other provision of law." Petitioner's general attack on the constitutionality of the must-carry statute is therefore jurisdictionally barred in this case.

Even if that statutory bar did not exist, petitioner's facial challenge to the must-carry provisions would not be properly before the Court because petitioner did not press that challenge below and the court of appeals therefore did not pass on it. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where

issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). As the court of appeals noted, petitioner "presented" it with "neither factual support nor even a theory" of any First Amendment claim other than its fact-specific as-applied challenge. Pet App. 24a.[2]

b. Even if petitioner's facial challenge were properly before the Court, this case would be an unsuitable vehicle for deciding whether changed circumstances have rendered the must-carry provisions unconstitutional. Because petitioner failed either to invoke the three-judge court or to provide the Commission or the court of appeals with meaningful evidence in support of its claim of changed circumstances, the record in this case does not contain the broad range of data that would be needed to evaluate the constitutionality of the must-carry statute under present circumstances. Moreover, as petitioner notes, the constitutionality of the must-carry statute "has broad significance for virtually every cable system and broadcast station in the country." Pet. 16. Until filing its petition for a writ of certiorari, however, petitioner litigated this case as a fact-specific challenge to an adjudicatory order affecting only it and WRNN. Other parties whose interests would be affected by a broad constitutional ruling therefore had no

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[2] Petitioner included one footnote in its court of appeals brief speculating that this Court would not now "reach the same conclusion" as it did in the *Turner* cases "[g]iven the dramatic changes in circumstances." Pet. C.A. Br. 60 n.164. If petitioner intended to preserve its facial attack on the must-carry statute by means of this footnote, that effort failed in light of the Second Circuit's rule that it "do[es] not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review." *United States* v. *Restrepo*, 986 F.2d 1462, 1463, cert. denied, 510 U.S. 843 (1993).

incentive to seek to protect those interests, or to supplement the evidentiary record, in the proceedings below.

This Court's decision in *Turner II*, which arose from suits filed under Section 555, relied heavily on the comprehensive record developed before the three-judge district court. See 520 U.S. at 187 ("The District Court oversaw another 18 months of factual development on remand 'yielding a record of tens of thousands of pages' of evidence, comprised of materials acquired during Congress' three years of preenactment hearings, as well as additional expert submissions, sworn declarations and testimony, and industry documents obtained on remand.") (citation omitted) (quoting *Turner Broad.* v. *FCC*, 910 F. Supp. 734, 755 (D.D.C. 1995), aff'd, 520 U.S. 180 (1997)). A complete record was especially critical, the Court emphasized, because of the "substantial deference" that courts owe "to the predictive judgments of Congress." *Turner I*, 512 U.S. at 665 (plurality opinion). Any reexamination of the constitutionality of must-carry should similarly proceed upon an evidentiary record that reflects the "importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties [will likely] contend are to be drawn from the statistics and other evidence presented." *Id.* at 668 (plurality opinion).

The thin record in this case is inadequate to serve that purpose. Petitioner and its amici attempt to fill in the evidentiary gap by citation to extra-record evidence, including blog postings (Pet. 20 n.8, Time Warner Br. 18); Wall Street analyst reports (Time Warner Br. 21); and articles from newspapers (Discovery Br. 12), law reviews (Pet. 19 n.7, Time Warner Br. 15 n.5), and trade journals (Pet. 20 n.8). Such material is no substitute for the detailed factual record the Court previously found

necessary to decide the facial constitutionality of the must-carry statute.

c. Petitioner contends that cable television operators now face "vibrant competition" and no longer "possess bottleneck power" in the video distribution market. Pet. 18. With the entry of direct broadcast satellite (DBS) providers (and more recently the local telephone companies) into the multi-channel video distribution market, the cable industry is now subject to greater competition than at the time of this Court's decisions in *Turner I* and *Turner II*. The latest Commission figures show that, as of June 2006, almost 28 million United States households, or approximately 29.2% of all United States video subscribers, subscribed to DBS service. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, 547 (2009) (¶ 12) (*Annual Assessment*); see also *id.* at 548 (¶ 14) (describing efforts by telephone companies to expand facilities-based video service).

In *Comcast Corp.* v. *FCC*, 579 F.3d 1 (2009), the D.C. Circuit stated that, in light of this increased competition, "[c]able operators * * * no longer have the bottleneck power over programming that concerned the Congress in 1992." *Id.* at 8; see Pet. 18. In later rejecting petitioner's challenge to another set of regulatory obligations imposed by the 1992 Cable Act, however, the D.C. Circuit observed that "the transformation [since 1992] presents a mixed picture." *Cablevision Sys. Corp.* v. *FCC*, No. 07-1425, 2010 WL 841203, at *7 (Mar. 12, 2010). The court explained:

> While cable no longer controls 95 percent of the [multichannel video programming distributor] market, as it did in 1992, cable still controls two thirds of the market nationally. In designated market areas

> in which a single cable company controls a clustered region, market penetration of competitive [providers] is even lower than nationwide rates.

Ibid.; see *id.* at *2 ("Because of * * * clustering and consolidation, a single geographic area can be highly susceptible to near-monopoly control by a cable company.").

In enacting the must-carry provisions, moreover, Congress was concerned not only with "promoting fair competition in the market for television programming"; it also sought to "preserv[e] the benefits of free, over-the-air local broadcast television," and to "promot[e] the widespread dissemination of information from a multiplicity of sources." *Turner I*, 512 U.S. at 662. The evidence available at that time indicated that "the viability of a broadcast station depends to a material extent on its ability to secure cable carriage," *Turner II*, 520 U.S. at 208, and that cable systems had strong incentives "to drop local broadcasters in favor of other programmers less likely to compete with them for audience and advertisers," *id.* at 200. Nothing in the record of this case suggests that those incentives have dissipated in recent years.

To be sure, as petitioner observes (Pet. 19-20), the percentage of Americans who rely solely on over-the-air broadcast television signals has decreased substantially. See *Annual Assessment*, 24 F.C.C.R. at 549 (¶ 16) (to 14% as of June 2006). Contrary to petitioner's suggestion (Pet. 20-21), however, that reduction does not necessarily diminish the government interests furthered by the must-carry requirements. The decreased number of over-the-air viewers makes carriage on cable systems even more critical to further the congressional interest in ensuring that "a multiplicity of broadcasters" are fi-

nancially able to provide an alternative source of programming to the American public. See *Turner II*, 520 U.S. at 221.

Petitioner's challenge to the 1992 Cable Act's must-carry requirements also takes no account of the technological developments that have greatly lessened the statute's burden on the cable industry. The Court previously upheld the must-carry requirements against the plaintiffs' constitutional challenge at a time when "[m]ore than half of the cable systems in operation" could carry only "between 30 and 53 channels." See *Turner I*, 512 U.S. at 628. As a result of digital compression, cable systems in 2005 had an "average" of at least 226 channels. *Annual Assessment*, 24 F.C.C.R. at 562 (¶ 44); see Time Warner Br. 10 (noting that ten digital channels can be provided using the same bandwidth as one analog channel). Because cable operators have far greater capacity to carry programming now than they had at the time of *Turner II*, the requirement that some channels be devoted to carriage of local broadcast stations is much less burdensome than it was when the must-carry provisions were previously sustained against constitutional attack.[3]

d. Petitioner contends that because of improvements in "A/B switches," which permit viewers to toggle between cable and broadcast antenna inputs, broadcast stations need not "be carried on cable to reach cable subscribers." Pet. 19. That claim was not raised before the agency or the court of appeals and therefore is not prop-

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[3] Petitioner's suggestion (Pet. 25) that carriage of WRNN would require it to "replace" C-SPAN fails to acknowledge petitioner's representation to the court of appeals that C-SPAN could be moved to another analog channel on petitioner's Long Island systems. See C.A. Mot. to Stay the Mandate 19.

erly before this Court. See 47 U.S.C. 405(a); *Yeskey*, 524 U.S. at 212-213.

In any event, this claim lacks merit. In *Turner II*, the Court specifically considered A/B switches as an alternative to must-carry regulation. 520 U.S. at 220. It concluded that the technology suffered from numerous flaws and therefore would not be an adequate alternative to the must-carry requirements. *Id.* at 220-221. In 2007, the Commission revisited the issue and found that "while A/B switches have largely moved from mechanical to electronic" operation, "switching signal sources still remains cumbersome or impossible for television viewers and does not represent an adequate alternative to must-carry." *Carriage of Digital Television Broad. Signals*, 22 F.C.C.R. 21,064, 21,090 (2007) (¶ 53), petition for review dismissed *sub. nom. C-SPAN* v. *FCC*, 545 F.3d 1051 (D.C. Cir. 2008). Because petitioner did not raise the A/B switch as an alternative until its petition for a writ of certiorari, the administrative record in this case contains no evidence to rebut those findings. The absence of any legal or factual basis on which to examine the A/B switch as an alternative to must-carry requirements is an additional reason why this case does not present a suitable occasion for this Court to reexamine the *Turner* decisions.

e. Finally, petitioner complains that stations with must-carry rights are entitled to carriage on a channel "on the most widely distributed—and thus most desirable—tier." Pet. 21. This is not a new market development warranting reconsideration of the Court's decisions in *Turner I* and *Turner II*. When the must-carry requirements were enacted, evidence before Congress indicated that cable operators would have an "increasing ability and incentive," not only "to drop local broadcast

stations from their systems," but to "reposition them to a less-viewed channel." *Turner II*, 520 U.S. at 197. Congress prohibited such practices by granting must-carry stations the right to "be carried on the cable system channel number on which the local commercial television station is broadcast over the air," and by requiring such channels to be "provided to every subscriber of a cable system." See 47 U.S.C. 534(b)(6) and (7).

Petitioner claims that these requirements represent new burdens, however, because they prevent cable operators from forcing broadcast stations onto new "digital" tiers. Pet. 21. But the cable industry has historically provided different tiers of service (see *Turner I*, 512 U.S. at 629); the fact that cable operators now employ digital technology for some of those tiers does not change the First Amendment calculus. The older, analog tiers, moreover, may soon be a thing of the past. The cable industry is moving toward all-digital operations to take advantage of the greater capacity that digital transmission provides. See *C-SPAN* v. *FCC*, 545 F.3d 1051, 1056 (D.C. Cir. 2008). Indeed, petitioner has announced that it will turn off analog service "throughout [its] footprint in the next year or two." Josh Wein, *Cablevision to Phase Out In-Home DVRs for Remote Storage*, Communications Daily, Feb. 26, 2010, at 9-10. There is no reason for this Court to address a transitional argument that could soon become moot as a result of technological developments.

4. Petitioner also seeks review of the question whether the must-carry requirements effect a "*per se* taking" in violation of the Fifth Amendment. Pet. 23-24. That claim lacks merit.

Per se takings should be "easily identified," *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning*

Agency, 535 U.S. 302, 324 (2002), and should "present[] relatively few problems of proof," *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982). Contrary to these admonitions, petitioner's novel and "amorphous" takings claim involves "bits of data over cable bandwidth" without any "physical occupation of [petitioner's] equipment or property." Pet. App. 25a-26a (quoting *id.* at 57a). The court of appeals correctly rejected petitioner's invocation of per se takings doctrine, and its decision does not conflict with that of any other circuit or otherwise warrant this Court's intervention.[4]

As the court of appeals observed, petitioner's takings claim "fits more comfortably" within this Court's "'regulatory taking' analytical framework." Pet. App. 26a (citing *Penn Cent. Trans. Co.* v. *City of N.Y.*, 438 U.S. 104 (1978)). Yet petitioner waived a regulatory-taking claim below by providing "no * * * evidence" in support of it. *Ibid.*; see *id.* at 57a (Commission noting that petitioner had "present[ed] virtually no substantive argu-

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[4] In a footnote (Pet. 24 n.11), petitioner quotes a 1978 Eighth Circuit opinion for the proposition that "a requirement that facilities be built and dedicated without compensation to the federal government (for public use) would be a deprivation forbidden by the Fifth Amendment." *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025, 1058, aff'd on other grounds, 440 U.S. 689 (1979). The Eighth Circuit's analysis does not conflict with the court of appeals' decision in this case because petitioner was not required to build any facilities for WRNN's benefit. See Pet. App. 25a. Petitioner also quotes (Pet. 24 n.11) Judge Williams's dissenting opinion in *Turner Broad. Sys., Inc.* v. *FCC*, 819 F. Supp. 32 (D.D.C. 1993), vacated, 512 U.S. 622 (1994), but Judge Williams did not "reach the contention * * * that those [must-carry] provisions also represent an unconstitutional taking of cablecasters' property in violation of the Fifth Amendment." *Id.* at 67 n.10. Rather, he simply stated that he did not "regard the claim as frivolous." *Ibid.*

ment that requiring carriage of WRNN-DT would constitute a regulatory taking."). The absence of a preserved regulatory taking claim in this case makes it a poor vehicle for consideration of the question whether the must-carry requirements violate the Fifth Amendment.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2010

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[5] Moreover, petitioner fails to explain how it may assert a taking claim in this case given the default rule that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act" for suit in the United States Court of Federal Claims. *Presault* v. *ICC*, 494 U.S. 1, 11 (1990) (quoting *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985)); see *Turner Broad.*, 910 F. Supp. at 749-750.

(7)

No. 09-901

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IN THE

Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA; AND
WRNN LICENSE CO., LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WRNN LICENSE CO., LLC

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QUESTION PRESENTED

Whether the Second Circuit correctly held that an order of the Federal Communications Commission restoring a number of Long Island communities to the local television market of broadcast station WRNN for purposes of the must-carry requirement was neither arbitrary and capricious nor contrary to the First Amendment on an as-applied basis.

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, WRNN License Co., LLC hereby certifies that it has no corporate parent and no publicly-owned corporation owns 10% or more of its equity stock.

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INTRODUCTION AND SUMMARY

Cablevision's petition purports to mount a radical attack on the "must carry" statute that this Court upheld in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v FCC*, 520 U.S. 180 (1997) ("*Turner II*"). Although Cablevision raised, and the lower court addressed, only a limited, as-applied challenge to one small portion of the must-carry statute, Cablevision now attempts to expand the scope of this case to include a broad facial challenge to the entire must-carry statute. Even were the Court wont to reexamine the *Turner* rulings, this case—a narrow, fact-specific market modification by the Federal Communications Commission ("FCC")—presents an exceedingly improper vehicle to do so.

As a threshold matter, Cablevision's challenge to must carry is jurisdictionally barred because it failed to follow the exclusive means established by Congress to bring constitutional challenges to the must-carry statute. Section 23 of the 1992 Cable Act provides: "Notwithstanding any other provision of law, any civil action challenging the constitutionality [of the must-carry provisions] . . . shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, United States Code." 47 U.S.C. § 555(c)(1). The statute could not be clearer—any constitutional challenge to must carry must be brought before the three-judge panel. This jurisdictional flaw alone justifies denying the petition.

Indeed, the posture of this case could not be more different from the *Turner* cases, nor more unsuited to a facial challenge. *Turner* involved a facial challenge to the entire must-carry statute pursuant to Section 23 of the Cable Act. The market-modification order under review, by contrast, was issued pursuant to a very narrow provision within the Cable Act and arises on petition for review under the Hobbs Act. The FCC's order restoring a handful of Long Island communities to WRNN's local television market turns on the unique facts of this case and is simply not worthy of this Court's attention.

Moreover, the record in this fact-specific case is inadequate to reexamine the *Turner* decisions. Unlike the *Turner* plaintiffs, Cablevision failed to create a plenary record before a three-judge court pursuant to Section 23 of the Cable Act. That is how the *Turner* cases reached this Court and that is why a detailed record on the state of both the cable and broadcast industries was before the *Turner II* Court. There is no such record in this case, because Cablevision is in the wrong forum as a matter of law.

Further, the court of appeals did not even pass upon Cablevision's primary Question Presented—a facial challenge to the must-carry statute as a whole. Even if this question were not jurisdictionally barred, it would not be a sound exercise of the Court's discretion to consider a question not first passed upon by a lower court. Cablevision presents three putative questions for certiorari, including an as-applied challenge and a statutory claim. Not only are these fact-bound questions unworthy of this Court's review, they have the potential to complicate the Court's ability to reach the first

Question Presented. *See Citizens United v. FEC*, 130 S. Ct. 876, 888 (2010) (noting obligation to resolve case on narrowest possible grounds). Cablevision's Questions Presented are exactly backwards to the order in which the Court would be required to address them.

Even if this case presented a proper vehicle, there is no reason for the Court to revisit the *Turner* decisions. In place for almost twenty years, the must-carry statute has become part of the fabric of the law in the television industry just as broadcast television has become a staple for the millions of Americans that still rely on free, over-the-air broadcasting for news and information. Lower courts have followed the *Turner* decisions without question, must carry has proven eminently workable, and hundreds of local broadcasters across the country have relied upon the must-carry statute. *Stare decisis* thus counsels strongly in favor of rejecting Cablevision's broadside against the broadcast industry and its attempt to strand millions of Americans without any source of television news and information.

Nor have developments in the marketplace eroded the need for must carry or altered the three important governmental interests served by must carry. Cablevision focuses myopically on market power, but the *Turner* Court recognized two other important governmental interests. Nothing indicates that must carry is any less essential to preserving over-the-air broadcasting, promoting a multiplicity of information sources, and ensuring fair competition. Indeed, cable's power and incentive to discriminate against broadcast content—and in favor of their own cable content—have remained constant since *Turner*. The record here

suggests that Cablevision wishes to retain its monopoly over Long Island news and information through its ownership of Long Island's only daily newspaper, Newsday, and its own regional news channel, News 12, which directly competes with WRNN for Long Island viewers and advertising dollars. Cablevision has not even attempted to make a record demonstrating lack of market power on Long Island, and, given publicly available facts, such a record would be impossible to make in light of cable's almost ninety-percent share of the multichannel video market in the New York Designated Market Area ("DMA").

At its core, Cablevision's plea—to dispense with must carry altogether in light of alleged changes in the marketplace—appears better suited to a legislative proposal. As Justice Kennedy wrote for the majority in *Turner II*, "[j]udgments about how competing economic interests are to be reconciled in the complex and fast-changing field of television are for Congress to make." 520 U.S. at 224.

Accordingly, the Second Circuit's straightforward application of the statute and *Turner* decisions to the facts of this particular market-modification case is not independently worthy of this Court's review. The FCC's decision is, like the must-carry statute, content neutral and subject to intermediate scrutiny. The court of appeals properly deferred to the Commission's reasoned judgment that restoring the Long Island communities to WRNN's local television market would advance the purposes of must carry. For these reasons, and those given below, the petition should be denied.

STATUTORY PROVISION INVOLVED

The full text of Section 23 of the Cable Act, 47 U.S.C. § 555, is attached hereto as Appendix A.

COUNTER STATEMENT OF THE CASE

WRNN is an independent, family-owned company that operates WRNN-DT, a local broadcast television station licensed in 1985 to Kingston, New York. In addition to entertainment and paid programming, WRNN has historically aired a substantial amount of regional news and public affairs programming targeted to the local communities within its service area. Pet. App. 42a. Much of this programming is of specific interest to residents of Long Island, New York and includes extensive coverage of local sports, news, weather, traffic, and current events. WRNN has received numerous Emmy awards for its originally-produced programming and was recently nominated for five more. WRNN's main competitor on Long Island is Cablevision's own regional cable news station, News 12. In addition to News 12, Cablevision controls Long Island's only daily newspaper, Newsday.

Under the must-carry provisions of the Cable Act, WRNN is presumptively entitled to carriage on Cablevision's cable systems that serve communities in Nassau and Suffolk Counties on Long Island. The must-carry statute requires cable operators, such as Cablevision, to "carry . . . the signals of local commercial television stations" in the same television market as the cable system. 47 U.S.C. § 534(a). Although it creates a presumption of carriage throughout a station's television market, the statute's market-modification

provision empowers the FCC to add or subtract communities from a station's market "to better effectuate the purposes" of must carry. *Id.* § 534(h)(1)(C)(i). When considering market-modification requests, the statute instructs the FCC to "afford particular attention to the value of localism by taking into account such factors as": (1) local service; (2) historical carriage; (3) coverage by other qualified stations; and (4) viewership. *Id.* § 534(h)(1)(C)(ii)(I)-(IV).

Congress enacted must carry to address cable operators' power and incentive to discriminate against broadcast television stations like WRNN. According to Congress, cable operators' "undue market power" and "the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals" endanger "the economic viability of free local broadcast television and its ability to originate quality local programming." Cable Act § 2(a)(2), 2(a)(16). The incentive comes from the fact that "[c]able television systems and broadcast television stations increasingly compete for television advertising revenues." *Id.* § 2(a)(14); *see also id.* § 2(a)(15). Vertical integration in the cable industry, *i.e.*, common ownership of cable systems and cable programming, gives cable systems an obvious incentive "to favor their affiliated cable programmers." *Id.* § 2(a)(5). Therefore, to ensure the continued viability of free local broadcast television, *id.* § 2(a)(16), cable operators "must carry" the signals of local broadcast stations in their television market.

Despite the presumption of carriage throughout the New York DMA, Cablevision successfully invoked the market-modification provision in 1996 to exclude the

Long Island communities from WRNN's market. The FCC's decision was based in substantial part on the fact that WRNN transmitted its signal from a location far from the Long Island communities. *Cablevision Sys. Corp.*, 11 FCC Rcd 6453 (1996), *aff'd*, *Market Modifications and the New York Area of Dominant Influence*, 12 FCC Rcd 12262 (1997), *aff'd*, *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998).

Following the 1996 market modification, WRNN corrected the deficiencies identified by the FCC by relocating its transmitter closer to the Long Island communities and commencing digital-only operations. Pet. App. 38a. Each of these changes was subject to prior approval by the FCC and a determination that the modifications furthered the public interest. C.A. App. 23. In addition, WRNN added more local programming and relocated its main studio to Manhattan. Pet. App. 41a. Because WRNN's new transmitter casts a powerful signal over both Kingston and almost all of Nassau County, the station is able to reach a substantially broader audience. *Id.* at 37a, 41a.

In the wake of these changes, multichannel video programming distributors ("MVPDs") in the New York television market, including Cablevision, increased their carriage of WRNN. For example, Cablevision voluntarily entered into an agreement with WRNN to carry the station on its Bronx and Brooklyn systems. C.A. App. 20. Cablevision also carries WRNN on the vast majority of its systems in New York, New Jersey, and Connecticut. *Id.* at 21. Moreover, RCN initiated carriage in Manhattan and Queens, and direct broadcast satellite ("DBS") operators DIRECTV and DISH Network carry

WRNN on Long Island. *Id.* And, since 2006, Verizon has been carrying WRNN on its FiOS systems on Long Island. *Id.* at 724, 740. In fact, WRNN is now carried by every major MVPD on Long Island and its surrounding areas—except for Cablevision in Nassau and Suffolk Counties.

Based on all of these changes, in 2005 WRNN requested restoration of its carriage rights in the cable communities served by Time Warner Cable's ("TWC") systems in New York City that were deleted from WRNN's market as part of the 1996 proceedings. The FCC's Media Bureau granted WRNN's request, *WRNN License Co.*, 20 FCC Rcd 7904 (2005), but not before TWC had voluntarily agreed to carry WRNN and waived any appeal of the Bureau's ruling. TWC concedes that the must-carry statute requires carriage of WRNN based on facts that are virtually identical to this case. TWC Br. 3.

WRNN later asked the FCC to restore to its market the Long Island communities served by Cablevision that were deleted in 1996. Not surprisingly, all of the modifications to WRNN's operations convinced the FCC to restore WRNN's must-carry rights. The FCC's Media Bureau found the strength of WRNN's digital signal, which now covered the Long Island communities, to be decisive. Pet. App. 44a. The Bureau also credited evidence that WRNN is carried by Cablevision and its competitors in adjacent communities. *Id.* at 39a-40a. The full Commission affirmed the Bureau, noting also that WRNN "submitted a substantial record that details programming that focuses on Long Island, particularly communities in Nassau County and communities in

Suffolk County that border Nassau County." *Id.* at 52a. The Commission found carriage to be "in accordance with the Act and Commission precedent," *id.*, and rejected Cablevision's as-applied First and Fifth Amendment challenges, *id.* at 54a-55a.

Cablevision appealed the FCC's order pursuant to the Hobbs Act. 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342, 2344. Finding "no abuse of discretion or constitutional violation," Pet. App. 26a, the Second Circuit unanimously upheld the FCC's decision. The court of appeals found that the FCC had properly analyzed the statutory factors and that carriage of WRNN was consistent with the purposes of must carry. *Id.* at 11a-19a.

The court of appeals also rejected Cablevision's as-applied constitutional challenges to the FCC's order. The Second Circuit found this Court's *Turner* decisions to provide the proper analytical framework. In its *Turner* decisions, this Court rejected the cable industry's First Amendment challenge to the must-carry statute brought pursuant to Section 23 of the Cable Act, and recognized that must carry furthers three important governmental interests. The Court held that the must-carry provisions were content neutral and subject to intermediate scrutiny, *Turner I*, 512 U.S. at 661-62, and were narrowly tailored to advance the government's important interests in "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming," *Turner II*, 520 U.S. at 189 (quotation omitted).

Finding the FCC's order content neutral in light of *Turner I*, the court of appeals had "no trouble" concluding that the order also passed intermediate scrutiny under the First Amendment. Pet. App. 23a. As the Second Circuit found, the "burden imposed by the order—the loss of control over one channel—is no greater than necessary to further the government's interest in preserving a single broadcast channel it found serves the local community." *Id.* at 23a-24a. The court of appeals also rejected Cablevision's Fifth Amendment claim, concluding that "transmission of WRNN's signal does not involve a physical occupation of Cablevision's equipment or property." *Id.* at 25a.

On August 6, 2009, Cablevision sought panel rehearing and rehearing en banc, which were denied without dissent on October 29, 2009. *Id.* at 70a. Cablevision filed a timely petition for a writ of certiorari on January 27, 2010.

REASONS FOR DENYING THE PETITION

I. This Case Is An Improper Vehicle To Reexamine The *Turner* Decisions.

Section 23 of the Cable Act bars Cablevision's attempt to use this case as a vehicle to reexamine the *Turner* decisions. Section 23 of the Cable Act provides that "[n]otwithstanding any other provision of law, any civil action challenging the constitutionality of section 534 or 535 of this title or any provision thereof shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of Title 28." 47 U.S.C. § 555(c)(1). The statute further permits a

direct appeal to this Court. *Id.* § 555(c)(2). The *Turner* Court considered the constitutionality of the must-carry provisions only after a first look by a three-judge district court. *Turner I*, 512 U.S. at 634-35. Indeed, as that three-judge court found, "[o]riginal jurisdiction of the three-judge court is tied to constitutional challenges to [the must-carry provisions], as is review as a matter of right in the Supreme Court." *Turner Broad. Sys., Inc. v. FCC*, 810 F. Supp. 1308, 1311 (D.D.C. 1992). Cablevision's failure to follow Section 23 warrants denial of the petition.[1]

In any event, this unique case is not a vehicle for the Court to reexamine the "factual underpinnings" of the *Turner* decisions—in particular, the state of competition in the video marketplace. Pet. 1. The FCC restored a handful of Long Island communities in a small slice of New York to WRNN's local television market based on facts unique to this case—the strength of WRNN's digital television signal, carriage by other MVPDs, and the unique geography of the New York television market. Indeed, Cablevision highlights the fact-specific nature of this case in its own Questions

[1] Cablevision notes that it appealed the FCC's order pursuant to the Hobbs Act and invoked the Constitution as a defense. Pet. 6 n.2. But Section 23 of the Cable Act is emphatic in lodging exclusive jurisdiction over all constitutional challenges in the three-judge district court. If Cablevision wished to mount a constitutional challenge to must carry—particularly a facial challenge to the entire statutory scheme—it should have done so in the three-judge court. The "[n]otwithstanding any other provision of law" clause of Section 23 obviously includes the Hobbs Act and the "any civil action" phrase just as obviously includes this case.

Presented when it asks the Court to consider whether it should have to carry WRNN when "the station lacks an over-the-air audience in the area in which the station is seeking carriage, the broadcast station's traditional over-the-air market is well outside that area, the station does not need cable carriage to remain viable, the cable operator has declined carriage for legitimate editorial reasons, [and] the cable operator is subject to unusually robust competition." Pet. i-ii. The FCC's order thus requires a single cable operator, Cablevision, to carry a single broadcast television station, WRNN, on cable systems in a handful of communities on Long Island based on the specific facts of this case. This case is not a proxy for the entire broadcast and cable industries.

This case is unique even within the world of must carry. As noted by the court below, Pet. App. 22a-23a, a prior decision of the Second Circuit excluded Long Island from what is presumptively WRNN's local television market, the New York DMA. Thus, this case is about *restoring* must-carry coverage under a very specific provision of the must-carry statute—the market-modification provision. 47 U.S.C. § 534(h)(1)(C). The narrow issue of the constitutionality of the market-modification provision itself was not addressed in the *Turner* decisions and is not independently worthy of this Court's review.[2]

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[2] Cablevision and its *amici* urge the Court to consider a question left open by *Turner I*: whether a market-modification decision "to grant must-carry privileges upon request to otherwise ineligible broadcast stations" might confer "special benefits on the basis of content." 512 U.S. at 644 n.6 (citing 47 U.S.C. § 534(h)(1)(C)(ii)). This case does not present the (Cont'd)

Moreover, this case lacks the factual record that would be needed to reexamine the *Turner* decisions. In particular, there is no comprehensive, nationwide record regarding the state of competition in the subscription video market as was before the Court in *Turner II*. This Court upheld must carry with the benefit of "unusually detailed statutory findings" regarding the state of competition in the cable and broadcast industries, *Turner I*, 512 U.S. at 646, and finally ruled only after "another 18 months of factual development on remand 'yielding a record of tens of thousands of pages' of evidence, comprised of materials acquired during Congress' three years of preenactment hearings, as well as additional expert submissions, sworn declarations and testimony, and industry documents obtained on remand," *Turner II*, 520 U.S. at 187 (citations omitted). The Court specifically relied upon evidence regarding cable operators' "considerable and growing" market power, *id.* at 197, the structure of the cable industry, *id.*, vertical integration, *id.* at 198, cable systems' incentive to drop local broadcasters, *id.* at 200, the number of broadcast stations actually dropped, *id.* at 202, the importance of advertising revenues, *id.* at 203, the percentage of local broadcasters denied carriage, *id.* at 204, and the importance of carriage to broadcast stations, *id.* at 208.

(Cont'd)
Court with an opportunity to answer that question because WRNN *is* eligible for "must-carry privileges" on Long Island, and the FCC simply restored these communities to WRNN's presumptive market.

Cablevision has not compiled anything close to a comparable record. Instead, Cablevision urges the Court to turn heel on the *Turner* decisions based on a single sentence in *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009)—a decision that has nothing to do with must carry and was not decided under the First Amendment. There is no record in this case negating cable's market power and incentive to discriminate in general, nor is there any evidence that Cablevision lacks bottleneck monopoly power in the Long Island communities at issue here. *See infra* Part II.B. Further, C-SPAN's claim that millions of homes lost access to its programming in the wake of must carry's enactment, C-SPAN Br. 7, is precisely the kind of unsupported assertion that necessitated a remand in *Turner I*. 512 U.S. at 667-68. Simply put, Cablevision has not compiled the record necessary to consider "transformative market and technological changes" since *Turner*. Pet. 15. It would be impossible to give fair consideration to Cablevision's first Question Presented on the limited administrative record compiled in this fact-specific market-modification case.

Finally, there is no opinion below addressing a facial challenge to the must-carry statute. This Court "do[es] not decide in the first instance issues not decided below," *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999), precisely because deciding an issue "without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990). Whereas the *Turner* cases considered the facial constitutionality of the must-carry provisions as a whole, Cablevision brought an as-applied challenge to the

FCC's order modifying WRNN's market on Long Island pursuant to the multi-factor test in Section 534(h)(1)(C)(ii). The facial validity of the must-carry statute has never been squarely presented or even at issue in this case. The only First Amendment question passed upon by the Second Circuit and the FCC was whether "compelled carriage of WRNN on Long Island violates the First Amendment on an as-applied basis." Pet. App. 19a (quoting Cablevision Br. at 51). Thus, the issue raised by Cablevision's primary Question Presented was neither pressed nor passed upon below. It would be ill-advised for the Court to consider this question without the benefit of a first look at a substantial factual record by a lower court.[3]

II. The Constitutional Validity Of Must Carry Remains Settled Law.

On the merits, the petition meets none of the criteria of Supreme Court Rule 10 and therefore should be denied. The petition points to no conflict in the circuits about the constitutionality of must carry or the *Turner* decisions. The most Cablevision can do is make the bald assertion that new facts undermine settled law. Pet. 15. As shown below, the assertion itself is in error and thus

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[3] Citing *Citizens United*, Cablevision argues that the as-applied nature of its challenge does not prevent the Court from considering the facial validity of the must-carry statute. Pet. 16 n.4. Unlike in *Citizens United*, where the Court reached a facial challenge after the district court had actually "passed upon" the issue, 130 S. Ct. at 892-93, the Second Circuit in this case never "passed upon" a facial challenge to the must-carry statute because it was never asked to.

the doctrine of *stare decisis* firmly counsels denial of the petition.[4]

A. There Is No Conflict Of Authority.

There is no reason to grant the writ to revisit unquestioned precedent. The constitutional validity of the must-carry provisions has been settled law since this Court rejected the cable industry's First Amendment challenge in its *Turner* decisions. Since then, no court has questioned the validity of the must-carry statute, and lower courts have uniformly upheld compelled carriage in similar contexts. In fact, the Fourth Circuit upheld a form of must carry as applied to DBS. *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002). The Fourth Circuit reached the conclusion that such a carriage requirement was constitutional as applied to the second player in the market and given market conditions in 2001.

Indeed, a long line of cases has uniformly upheld must-carry orders from the FCC in various contexts similar to that presented here. *See, e.g.*, *WLNY-TV*, 163

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[4] In addition to its First Amendment challenge, Cablevision urges the Court to consider whether must carry constitutes a *per se* taking in violation of the Fifth Amendment. Pet. 23-24. But Cablevision has not framed a question presented asking the Court to take up that issue. In any event, a *per se* taking results in a "permanent physical occupation" of property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), but the court of appeals found that Cablevision "effectively conceded that this physicality is absent here." Pet. App. 25a.

F.3d at 144-45; *Costa de Oro Television, Inc. v. FCC*, 294 F.3d 123, 129-130 (D.C. Cir. 2002); *see also C-SPAN v. FCC*, 545 F.3d 1051, 1057 (D.C. Cir. 2008) (dismissing cable programmers' appeal of FCC order updating the must-carry rules for lack of standing). Even outside the must-carry context, courts have upheld Cable Act requirements designed to promote competition and limit cable's market power. *Cablevision Sys. Corp. v. FCC*, Nos. 07-1425 & 07-1487, 2010 WL 841203 (D.C. Cir. Mar. 12, 2010) (affirming FCC's extension of Cable Act's prohibition against exclusive contracts between cable operators and affiliated programmers). The Second Circuit's decision applying the *Turner* decisions to the facts of this case is perfectly consistent with this unbroken line of authority.

Where, as here, unquestioned precedent has become the bedrock of entire industries, the Court hews closely to the principle of *stare decisis* to "avoid[ ] the instability and unfairness that accompany disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 243-44 (2006). Overruling the *Turner* decisions would be a disaster for the broadcast industry as well as the millions of Americans that rely exclusively on over-the-air broadcast signals as their sole source of television programming. *Carriage of Digital Television Broadcast Signals*, 22 FCC Rcd 21064 ¶ 54 (2007) ("*Viewability Order*") ("Thus, the viability of local broadcast stations and, consequently, the availability of over-the-air broadcasts for non-cable households depend to a material extent on cable carriage."). During the almost twenty years that must carry has been in force, some forty percent of all broadcast stations have come to rely upon this statute, and the entire cable industry has

adjusted to this regulatory reality. If the *Turner* decisions were suddenly reversed, broadcast stations currently carried by cable systems pursuant to must carry would be dropped and forced to negotiate carriage on cable systems with staggering market power relative to local broadcasters. Cablevision thus bears an extremely heavy burden to overcome the presumption in favor of adhering to the *Turner* decisions. *Randall*, 548 U.S. at 244 ("Departure from precedent is exceptional, and requires special justification." (internal quotation marks omitted)). Respect for this Court's precedent and consideration of the enormous reliance interests spawned by the *Turner* decisions strongly counsel against certiorari in this case.

B. Must Carry Remains Necessary To Address Cable's Power And Incentive To Discriminate Against Broadcasters.

The central premise of Cablevision's petition is that the marketplace has changed since 1997 such that must carry has become unnecessary. Pet. 15. Not only does Cablevision offer scant record evidence to support its claim, publicly available facts and FCC decisions since this Court's decision in *Turner II* prove that it is untrue. The justification for must carry is at least as strong today as it was in 1997.[5]

[5] Cablevision incorrectly attempts to place the burden on the government to show that must carry remains valid. Pet. 17-18. A governmental entity need not reinvent the wheel in each particular case to demonstrate the existence of an important (Cont'd)

First, the benefits of digital television amplify the importance of preserving free, over-the-air broadcast television, which Congress and this Court have recognized as a governmental interest of the highest order. *Turner I*, 512 U.S. at 662-63. The death of broadcast television—furthered by viewers' steady migration from broadcast to cable and satellite television—would deliver a devastating blow to the public interest; it would leave some fifteen million over-the-air television households throughout the country without a free source of video news and information.[6] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542 ¶ 16 (2009) ("*Thirteenth Annual Report*"). By and large, these fifteen million television households (or approximately forty-five million Americans) occupy the lower socioeconomic brackets of our society and cannot afford to pay for cable. Providing all Americans with free access to news, information, and opinion is central to the functioning of our democracy. No one should be excluded from the marketplace of ideas.

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government interest. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)). The FCC properly relied upon the evidence before the *Turner* Court that must carry is justified by cable operators' power and incentive to discriminate against broadcasters. It is Cablevision's burden to show a "special justification" to disregard that finding. *Randall*, 548 U.S. at 244.

[6] Cablevision and TWC describe the fifteen million households still relying on over-the-air television as an insignificant number, Pet. 19-20, TWC Br. 17, yet this number is larger than TWC's entire customer base and five times that of Cablevision's.

Second, must carry remains necessary to stop cable operators from discriminating against broadcasters. Congress recognized that cable operators have the power and economic incentive to discriminate against local broadcast stations, like WRNN, that directly compete for advertising revenue. Cable Act § 2(a)(5), (14)-(16); *Turner I*, 512 U.S. at 633. Vertical integration motivates cable to discriminate against broadcasters in favor of programming in which they have an equity stake. *Id.* at 646. Importantly, the evidence before Congress showed that the threats to local broadcasters would only increase in the future. *Turner II*, 520 U.S. at 203-04, 212. Market developments demonstrate that Congress' concerns are as valid today as they were in 1992. *Thirteenth Annual Report* ¶ 183; *see also Cablevision Sys. Corp.*, 2010 WL 841203, at *1, *7.

The incentive for cable to prefer affiliated programmers has grown even greater over time. The FCC recently adopted new program access rules because cable operators—Cablevision in particular—have "unfairly" withheld affiliated programming from competing MVPDs in a manner that "significantly hinder[s]" competition in the video marketplace. *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, No. 07-198, ¶¶ 25-32 (rel. Jan. 20, 2010) ("*2010 Program Access Order*"). Moreover, in this very case, Cablevision operates its own regional news station, News 12, which directly competes on Long Island with WRNN's local news and public affairs programming. Combined with the inherent incentive to discriminate against local broadcasters, Cablevision's operation of News 12, as well as its control of the only Long Island daily

newspaper, Newsday, provides additional incentive to deny carriage for anticompetitive purposes.

Third, must carry was intended not just to protect broadcasters from anticompetitive behavior, but also to preserve a "multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus." *Turner II*, 520 U.S. at 194. Here, carriage of WRNN ensures that Long Island residents are not held hostage by Cablevision's monopoly power over information on Long Island through its ownership of both News 12 and Newsday. Must carry thus insures that Long Island viewers have access to an information source other than those owned by Cablevision. Considering the increased vertical integration in the cable industry since 1992, cable's market power and financial incentive to discriminate remain a threat to broadcasters that provide the local programming Congress intended to preserve.

Cablevision argues that the justification for must carry has evaporated because cable operators no longer have "bottleneck" power.[7] Pet. 18. The only evidence Cablevision can muster in support of this argument is a single sentence of dictum from an opinion issued after the Second Circuit ruled in this case. Cablevision makes

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[7] Cablevision takes a cramped view of "*Turner*'s rationale," Pet. 1, describing it as resting upon "an intricate chain of reasoning," Pet. 4, as if it were a fragile one-legged stool. In fact, *Turner II* found that three separate important governmental interests were furthered by the must-carry provisions. Cablevision focuses solely on "bottleneck" power, but cannot argue that the important governmental interest in a multiplicity of voices is not furthered by must carry.

no attempt to argue that the D.C. Circuit's *Comcast* decision conflicts with the Second Circuit's decision in this case, nor could it. The actual holding of the *Comcast* court was a run-of-the-mill administrative law determination that the FCC had failed to consider a salient factor in its analysis of the cable subscriber limit provision in the Cable Act, 47 U.S.C. § 533(f). Indeed, the D.C. Circuit had directed the FCC "*to consider* the competitive impact of DBS companies" in a prior ruling. *Comcast*, 579 F.3d at 7 (emphasis added).

In any event, Cablevision is wrong; cable operators still have the same market power and incentive to discriminate against broadcasters as they did when *Turner II* was decided.[8] The FCC recently concluded, in the context of updating its must-carry rules for the transition to digital television, that cable operators' market power still represents a threat to free, over-the-air broadcasting. "Although it faces competition by DBS operators and others, the cable industry by far remains the dominant player in the market, commanding approximately 69 percent of all MVPD households." *Viewability Order* ¶ 49. "By contrast, the percentage of households that rely on over-the-air broadcast signals has declined significantly since the *Turner* decisions," marking a "shift in the competitive balance between

[8] Cablevision relies heavily upon Justice Breyer's concurring opinion in *Turner II*, Pet. 18-19, yet ignores the fact that he would have upheld must carry regardless of cable's bottleneck monopoly power. According to Justice Breyer, "assur[ing] the over-the-air public access to a multiplicity of information sources . . . provides sufficient basis for rejecting appellants' First Amendment claim." *Turner II*, 520 U.S. at 226 (Breyer, J., concurring) (internal quotation marks omitted).

broadcast and cable." *Id.* "In addition, cable operators continue to exercise control over most (if not all) of the television programming that is channeled into the subscriber's home [and] can thus silence the voice of competing speakers with a mere flick of the switch." *Id.* ¶ 50 (internal quotation marks omitted).

The growth of satellite providers has not come at cable's expense, but at the expense of over-the-air broadcasting. While cable's market position has remained constant since *Turner*, *compare* Cable Act § 2(a)(3) *with Thirteenth Annual Report* ¶ 10, satellite providers have increased their market share as the number of households relying on over-the-air services has declined, *compare id.* ¶ 12 *with id.* ¶ 16. The emergence of satellite as an alternative to cable has only increased the threat to broadcasters.

Congress recognized the growing threat posed by satellite providers when it enacted the Satellite Home Viewer Improvement Act ("SHVIA") in 1999 to "preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources." H.R. Conf. Rep. No. 106-464, at 101 (1999). Akin to the must-carry provisions of the Cable Act, SHVIA contains a "carry one, carry all" provision requiring satellite providers to carry all broadcast television signals in markets where they provide local service, 47 U.S.C. § 338, which, as mentioned above, has been upheld against a constitutional attack similar to the one brought by Cablevision here. *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001). This Court denied certiorari in that case. 536 U.S. 922 (2002).

In light of current market conditions, the D.C. Circuit recently rejected the very argument Cablevision makes here. The court ruled that changes in the video marketplace did not undermine its earlier decision upholding the Cable Act's exclusivity prohibition against a facial First Amendment challenge.[9] *Cablevision Sys. Corp.*, 2010 WL 841203, at *4-5. While "[i]t is true that the MVPD market has transformed substantially since the Cable Act was enacted in 1992," the court concluded, "the transformation presents a mixed picture." *Id.* at *7. "[C]able still controls two thirds of the market nationally," but "[i]n designated market areas in which a single cable company controls a clustered region, market penetration of competitive MVPDs is even lower than nationwide rates." *Id.* The court noted that in many DMAs "consumers continue overwhelmingly to subscribe to cable. Because of this clustering and consolidation, a single geographic area can be highly susceptible to near-monopoly control by a cable company." *Id.* at *2.

Indeed, the FCC specifically found that cable's share of the MVPD market in the New York DMA exceeded eighty percent in July 2007. *Implementation of the*

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[9] Judge Kavanaugh dissented, arguing that the FCC's exclusivity ban—which Congress intended to "sunset" within ten years of the 1992 Cable Act barring extension by the FCC—was no longer necessary to further competition. However, Judge Kavanaugh relied upon the *Turner* decisions no less than thirteen times and specifically cited *Turner I* to support his view that "[w]hen a speech market is not competitive, content-neutral government intervention may sometimes be permissible." *Cablevision Sys. Corp.*, 2010 WL 841203, at *20 (Kavanaugh, J., dissenting).

Cable Television Consumer Protection and Competition Act of 1992, 22 FCC Rcd 17791 ¶ 52 n.277 (2007) (citing Nielsen Media Research data). More recent data show that cable's share of the New York MVPD market has now grown to nearly ninety percent.[10] Simply put, cable still has the market power and the incentive to refuse to carry the signals of local broadcast television stations—like WRNN.[11]

In addition to competition, Cablevision points to a number of other purported changes in the marketplace in its attempt to undermine must carry. Pet. 19-21. None make a dent in this Court's conclusions in *Turner II*.

First, the *Turner II* Court rejected A/B switches as an alternative to must carry "based on substantial evidence of technical shortcomings and lack of consumer acceptance." 520 U.S. at 221. The same is true today, as the FCC recently found. *Viewability Order* ¶ 53 ("[S]witching signal sources still remains cumbersome or impossible for television viewers and does not represent an adequate alternative to must-carry regulation.").

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[10] DMA Household Universe Estimates February 2010: Cable And/Or ADS (Alternate Delivery Systems), http://www.tvb.org/nav/build_frameset.asp (follow "Research Central" hyperlink; then follow "Market Track" hyperlink; then follow "Cable and ADS Penetration by DMA" hyperlink) (last visited Mar. 24, 2010).

[11] The Cable Act allows broadcasters to elect retransmission consent, rather than must carry, and negotiate carriage with cable operators. 47 U.S.C. § 325(b). This ensures that must carry is only invoked by broadcasters like WRNN that need must carry to gain carriage in markets where cable has the power and incentive to discriminate. *See Turner II*, 520 U.S. at 217.

Second, the fact that some fifteen million American television households (or approximately forty-five million Americans) still rely on over-the-air television broadcasting only illustrates the importance of the governmental interest at stake. Congress intended to preserve a multiplicity of broadcast stations for the underprivileged and underserved Americans that still rely on over-the-air broadcasting and do not subscribe to cable or another MVPD. *Turner II*, 520 U.S. at 194. While cable still commands a large share of the market, the percentage of households that rely on over-the-air broadcast signals has declined. This "shift in the competitive balance between broadcast and cable" has further weakened broadcast stations and represents a threat to the survival of free, over-the-air broadcasting that led Congress to enact must carry. *Viewability Order* ¶ 49. In other words, the underlying problem addressed by the must-carry statute has only grown worse—local broadcast television is in a more precarious state than it was in 1997.

Third, technological advances have substantially mitigated the burden imposed by must carry. The *Turner I* Court recognized that, "given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium." 512 U.S. at 639. The *Turner II* Court later found that "the evidence adduced on remand indicates the actual effects [of must carry] are modest." 520 U.S. at 214. The FCC now predicts "that cable capacity will continue to expand in future years, thus further decreasing the relative burden on cable operators." *Viewability Order* ¶ 60. Cable operators like Cablevision now have "the

means of adding channels and never running out of capacity" because they have migrated most of their customers from analog to digital cable. *Id.* Because Cablevision's digital-cable systems "offer so much more capacity, the proportion of overall bandwidth devoted to must-carry signals is that much smaller than was the case at the time of the *Turner* decisions." *Id.*; TWC Br. 20-21 (noting "the increased channel capacity on TWC's systems as compared to 15 years ago").[12]

In fact, Cablevision's actions in this case belie any notion that carriage of WRNN would be burdensome or contrary to neutrally-exercised "editorial discretion." Pet. 10. Cablevision laments that it will have to replace C-SPAN with WRNN on some systems, Pet. 25, but Cablevision moved C-SPAN onto Channel 48 *after* the FCC issued an order that requires carriage of WRNN on that same channel. Moreover, Cablevision recently initiated carriage of another Kingston-area television station that broadcasts from the same transmitter site as WRNN,[13] even though the FCC excused Cablevision from carrying WTBY in the same 1996 proceeding in which the FCC initially modified WRNN's market. *Cablevision Sys. Corp.* ¶¶ 61-64.

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[12] In contrast with the exponential increase in cable capacity, the number of broadcast stations eligible for must carry has remained essentially static since *Turner II*. *Thirteenth Annual Report* ¶ 106 & n.358. Thus, if a "large majority" of broadcasters have indeed elected retransmission consent over must carry, TWC Br. 20, then the burden of must carry has even further decreased over time.

[13] Mike Reynolds, *TBN Completes New York DMA Distribution Via Cablevision Rollout*, Multichannel News (Aug. 25, 2009).

III. The Second Circuit's Decision Is Consistent With *Turner* And The Must-Carry Statute.

In light of the validity of must carry, the Second Circuit's straightforward application of the *Turner* decisions and must-carry statute to the facts of this particular market-modification case is not worthy of this Court's review. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). As explained below, the Second Circuit's decision does not conflict with the *Turner* decisions or the must-carry statute.

A. The Second Circuit Correctly Applied The *Turner* Decisions To This Case.

The Second Circuit unanimously rejected Cablevision's First Amendment challenge by applying the principles recognized in the *Turner* decisions to the facts of this market-modification case.[14] Far from "expanding [must carry's] application to new contexts," Pet. 2, the Second Circuit's decision falls within the heartland of the *Turner* decisions. *Turner II* upheld must carry in a station's local television market—the exact decision rendered by the FCC in this case when it restored the Long Island communities to WRNN's local television market.

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[14] Cablevision mischaracterizes the Second Circuit's decision when it argues that the court found Cablevision's as-applied challenge barred by the *Turner* decisions. Pet. 22-23. In fact, the court of appeals recognized "that the *Turner* cases do not foreclose the possibility of a successful as-applied First Amendment challenge," but concluded that "Cablevision has failed to demonstrate that the FCC applied the market modification provision unconstitutionally." Pet. App. 19a.

Cablevision argues, however, that the Second Circuit should have applied strict, rather than intermediate, scrutiny because the FCC relied upon the content of WRNN's programming. Pet. 30. The Second Circuit correctly rejected this argument. In *Turner I*, this Court held that the must-carry provisions are content neutral, 512 U.S. at 643-44, and rejected the argument "that the must-carry regulations are content based because Congress' purpose in enacting them was to promote speech of a favored content," *id.* at 646. Applying *Turner I*, the Second Circuit correctly found that the FCC's consideration of the market-modification factors was also content neutral. Pet. App. 22a. This Court's holding in *Turner I* that the promotion of localism and local broadcast television is not content based, 512 U.S. at 644-45, was properly followed by the Second Circuit.

The Second Circuit did not rule that "consideration of content triggers strict scrutiny only when there is an 'illicit content-based motive.'" Pet. 30. To the contrary, the court of appeals simply noted that Cablevision failed to prove "that restoration of the Long Island communities to WRNN's market under these circumstances was based on some illicit content-based motive." Pet. App. 23a. As *Turner I* recognizes, some speaker-based discrimination is permissible to further a non-content-based governmental interest. 512 U.S. at 660-61. That is all the Second Circuit recognized here.

Nor did the court of appeals create a "*de minimis* exception[ ] in the First Amendment area." Pet. 31. The Second Circuit stated that "WRNN's local programming was an inconsequential factor in the FCC's ultimate decision," Pet. App. 23a, because the strength of

WRNN's signal—not the content of WRNN's programming—was the crucial factor in restoring the Long Island communities to WRNN's presumptive market. *Id.* at 44a. This is borne out by the fact that the Media Bureau ordered carriage without a favorable finding regarding WRNN's local programming. *Id.* at 43a-44a. In any event, it is the avowed purpose of must carry to further localism and local broadcasting. It cannot suddenly be rendered unconstitutional because it accomplishes that goal in particular cases.

Cablevision makes a number of arguments in an attempt to show that *Turner* cannot be applied to specifically require carriage of WRNN on Long Island. Pet. 25-29. In addition to being completely unworthy of this Court's review, none are convincing.

First, Cablevision contends that carriage of WRNN cannot be justified because of WRNN's low viewership. Pet. 25-26. However, WRNN's low viewership levels are attributed to the fact that it returned its analog spectrum—with the FCC's approval—well in advance of the digital television transition. *WRNN-TV Assocs.*, 19 FCC Rcd 12343 (2004). WRNN is now a digital-only station broadcasting from a different facility that provides better coverage of the New York market than its former analog station. In any event, the *Turner II* Court rejected the argument that must carry could not be justified because of some broadcasters' low viewership levels, noting that the broadcast stations that stood to gain from the must-carry statute were those just like WRNN. 520 U.S. at 205-06. The Court understood that broadcasters denied cable carriage will typically have lower viewership levels than affiliated cable programmers. *Id.* at 206.

Second, the court of appeals correctly rejected Cablevision's argument that must carry was not intended to make broadcasters "better off" than they would have been in a world without cable. Pet. 26-27. This argument, the Second Circuit found, "rests on a conception of the statute's purpose that is overly narrow, unsupported by precedent, and contrary to the language of the statute." Pet. App. 17a. The purpose of the must-carry statute "is not to 'preserve' a group of broadcast stations, or a particular conception of a station's market, but, *inter alia*, to 'preserv[e] the benefits of free, over-the-air television,' and 'promot[e] the widespread dissemination of information from a multiplicity of sources.'" *Id.* at 19a (quoting *Turner I*, 512 U.S. at 662). Must carry is not served "only by granting broadcasters the minimum must-carry coverage necessary for survival." *Id.* Nor is the statute "frustrated by actions which result in a station's greater prosperity." *Id.*

Third, Cablevision's argument that the FCC was required to show that WRNN "will decline absent carriage" is a nonstarter. Pet. 27. A similar argument was rejected by the *Turner II* Court. 520 U.S. at 216 (rejecting argument that the "must-carry provisions are overbroad because they require carriage in some instances when the Government's interests are not implicated," such as where the broadcaster would survive without cable access). Neither the must-carry statute nor the *Turner* decisions require evidence that "hardship will befall the particular station at issue" in order for the FCC to modify a station's television market. Pet. 27.

Fourth, this case is the poster child for anticompetitive animus and the latest salvo in Cablevision's campaign to stifle competition in the New York market.[15] Although Cablevision trumpets its "editorial discretion" in declining to carry WRNN, Pet. 21, it is impossible to ignore Cablevision's real motive.[16] In this very case, Cablevision seeks to guard its monopoly over local news on Long Island through its ownership of News 12 and Newsday. Indeed, Cablevision's choice to carry WTBY highlights its anticompetitive animus because WTBY's religious

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[15] *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 672 (S.D.N.Y. 2002) ("Plaintiff has adequately alleged that Cablevision's monopoly in the regional sports programming market has been leveraged in the secondary markets of broadcast rights and advertising and caused price distortions consistent with a tangible harm to competition" (internal quotation marks omitted)); *2010 Program Access Order* ¶ 30 ("Cablevision has withheld the terrestrially delivered HD feeds of its affiliated MSG and MSG+ RSNs from certain competitors in New York City, Buffalo, and Connecticut.").

[16] Cablevision's and TWC's repeated characterizations of WRNN as a "home-shopping" station are both inaccurate and hypocritical. Like many stations, WRNN offers national paid and entertainment programming to support its acclaimed local news and public affairs programming. For example, WRNN recently received five Emmy nominations for programs such as "Focus on Veterans" and "Public Defenders/Drug Court." By contrast, both Cablevision and TWC carry three full-time "home-shopping" stations—ShopNBC, HSN, and QVC—on their basic tiers, all of which, unlike WRNN, offer no local programming. Cablevision and TWC apparently believe paid programming is beneficial except when it is carried by a competing broadcast station.

programming does not compete with Cablevision's News 12, but WRNN does. Cablevision has therefore done everything in its power for almost four years to keep WRNN off of its Long Island cable systems. In any event, the *Turner II* Court rejected the notion that the "must-carry provisions are overbroad because they require carriage in some instances" where the cable system operator has no specific anticompetitive motive. 520 U.S. at 216.

Last, Cablevision attempts to show it is subject to competition on Long Island by pointing to satellite operators' national growth and Verizon's recent initiation of its FiOS service on Long Island. Pet. 28. But Cablevision points to no evidence that satellite operators have cut into its specific market share on Long Island. Nor could it, because cable dominates nearly ninety percent of the New York MVPD market. *See supra* Part II.B. Moreover, the evidence before the Commission was that Verizon had barely even begun servicing Long Island—hardly sufficient time to make a noticeable dent in Cablevision's market share on Long Island. Pet. App. 39a, 62a. Indeed, in 2006 Verizon served little more than two percent of all television households. *Thirteenth Annual Report* ¶ 132.

B. The Second Circuit Properly Deferred To The Commission's Application Of The Must-Carry Statute.

Again, the issue of whether the FCC properly applied the market-modification provision in this case is simply not worthy of this Court's review. Even were it

so, the Second Circuit properly deferred to the Commission's reasoned judgment that carriage of WRNN is consistent with must carry. The Commission's interpretation and application of the must-carry statute is reviewed under the highly deferential standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Contrary to Cablevision's unsupported assertion, Pet. 34, the FCC *did* consider whether carriage of WRNN is consistent with must carry. Pet. App. 52a. So did the court of appeals. *Id.* at 19a. In this case, carriage of WRNN promotes localism and furthers the important objectives of must carry by ensuring that (1) WRNN remains economically viable in order to serve viewers throughout the New York DMA who rely on free, over-the-air television service; (2) Long Island residents have access to an information source in addition to those owned by Cablevision—News 12 and Newsday; and (3) WRNN is able to compete fairly with Cablevision's own News 12 for advertising revenues.

Cablevision argues that the FCC's order does not promote localism because it incents WRNN to neglect Kingston and cater to Long Island. Pet. 32-33. The Second Circuit recognized that this argument "rests on the false premise that WRNN's programming consists entirely of either Kingston-specific programming or Long Island-specific programming." Pet. App. 17a. Again, Cablevision "incorrectly presumes that WRNN cannot increase Long Island-targeted programming

without decreasing Kingston-targeted programming." *Id.*[17]

The Second Circuit also rejected Cablevision's argument that the FCC rewarded gamesmanship because WRNN is after "must-carry riches." Pet. 27. The court of appeals found this argument runs "counter to a central premise of the regulatory scheme that a regulated entity will change its conduct in socially desirable ways to achieve a regulatory benefit." Pet. App. 18a. In this case, WRNN adhered to the must-carry statute by correcting the deficiencies found by the FCC and Second Circuit (at Cablevision's urging) in 1996 to justify deletion of the Long Island communities from its presumptive market.

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[17] Cablevision's reliance upon the concept of a "traditional over-the-air service area" is a fiction created to restrict artificially the reach of must carry and confine stations like WRNN to small parts of the DMA. Pet. 33. As the Second Circuit recognized, WRNN is statutorily entitled to a presumption of carriage throughout the entire New York DMA, which includes Cablevision's cable systems on Long Island. The FCC was undoubtedly correct to restore carriage in light of that presumption.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTE

47 U.S.C. § 555

(a) Actions to review determinations by franchising authorities

Any cable operator adversely affected by any final determination made by a franchising authority under section 541(a)(1), 545 or 546 of this title may commence an action within 120 days after receiving notice of such determination, which may be brought in—

(1) the district court of the United States for any judicial district in which the cable system is located; or

(2) in any State court of general jurisdiction having jurisdiction over the parties.

(b) Available relief

The court may award any appropriate relief consistent with the provisions of the relevant section described in subsection (a) of this section and with the provisions of subsection (a) of this section.

(c) Review of constitutionality of sections 534 and 535

(1) Notwithstanding any other provision of law, any civil action challenging the constitutionality of section 534 or 535 of this title or any provision thereof shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of Title 28.

(2) Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under paragraph (1) holding section 534 or 535 of this title or any provision thereof unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

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No. 09-901

IN THE

Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTRODUCTION

In opposing review, the government seeks to continue a statutory intrusion on First Amendment rights long after the facts justifying it have evaporated. The government does not seriously dispute that dramatic industry changes have wiped out the linchpin of this Court's *Turner* decisions. The "bottleneck" that this Court previously concluded cable companies occupied has now disappeared in most locations (and everywhere Cablevision serves). Consumers can now choose among cable and two different satellite providers and often a local telephone company as well. "[T]he entry of direct broadcast satellite (DBS) providers (and more recently the local telephone companies)," the government agrees, has subjected cable companies "to greater competition." Br. 18. Indeed, as long as four years ago, "approximately 29.2% of all United States video subscribers" received their video service from cable's satellite competitors. *Id.* That fundamental change guts *Turner's* rationale for upholding the compelled speech contemplated by the must-carry regime.

The government nonetheless seeks to avoid review by raising a series of procedural objections. But those objections are meritless. Moreover, the FCC's specific application of must-carry in this case — to require Cablevision to displace quality channels of its choosing in favor of a home-shopping station with no over-the-air viewers — is incapable of coherent defense. And that application illustrates precisely why this Court must again consider the constitutionality of must-carry, this time in the favored as-applied context.

I. RESPONDENTS' PROCEDURAL OBJECTIONS LACK MERIT.

The government begins by claiming (at 15-16) that Cablevision's principal constitutional challenge is not properly before this Court — supposedly because it constitutes a "facial challenge." According to the government, Cablevision advanced only an "as applied" challenge below and is therefore not allowed to make "facial" arguments here. That argument is utterly confused.

Respondent WRNN initiated this case by asking the FCC to compel Cablevision to carry WRNN's signal. Cablevision defended itself by arguing that granting WRNN's request would infringe Cablevision's First Amendment rights. In support, Cablevision advanced some arguments that are relatively specific to the circumstances of Cablevision and WRNN (*e.g.*, that compelled carriage of WRNN is unlawful when WRNN has no over-the-air viewers), and other arguments based on facts that affect many other stations and systems as well (*e.g.*, that compelled carriage of WRNN is unlawful when the systems at issue are subject to competition from two satellite providers). But the sole relief Cablevision sought was that it not be required to carry WRNN.

The government now urges (at 15-16) that Cablevision's broader arguments must be deemed "facial challenges" because they imply that it is impermissible to impose must-carry obligations on *any* U.S. cable system. But a facial challenge asks a court to enjoin a measure's enforcement across-the-board not only as applied to the plaintiff but also as applied to absent third parties. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality); *id.*

at 80 n.3 (Scalia, J., dissenting); *Renne v. Geary*, 501 U.S. 312, 323-24 (1991); *id.* at 328 (White, J., dissenting). By contrast, Cablevision seeks only to stave off application of must-carry obligations *to it* in this particular case; Cablevision does not seek relief with respect to the statute's application to other cable systems.[1]

The government cites no authority for the strange notion that, where a defendant resists a statute's *actual application* to it, that "as applied" challenge somehow transmogrifies into a "facial" challenge when the precedential consequences of success become sufficiently far-reaching. The government likewise cites no precedent for the notion that an as-applied challenger's argument with broad precedential implications is somehow forfeited if it is not accompanied by magic "facial challenge" words. And any such notion is absurd. As the Chief Justice recently explained, an as-applied litigant naturally is entitled to make arguments that, if accepted, "would mean that any other [person] raising the same challenge would also win." *Citizens United v. FEC*, 130 S. Ct. 876, 919 (2010) (Roberts, C.J., concurring).

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[1] Besides, because Cablevision's arguments would not necessarily invalidate the statute as applied to *all* cable systems, this is not a facial challenge even under the government's (mistaken) theory. For example, the FCC has posited that there are pockets where satellite cannot compete. *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, ¶ 70 n.236 (2008) ("In northern latitudes, as well as highly urbanized or forested locations, it may not be possible to receive a DBS signal . . . ."), *vacated on other grounds*, *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

The government also urges (at 15) that Cablevision's broader arguments are barred by 47 U.S.C. § 555(c)(1), which provides that, "[n]otwithstanding any other provision of law, any civil action challenging the constitutionality of [the must-carry statute] shall be heard by a district court of three judges convened pursuant to" 28 U.S.C. § 2284.

That argument, which was not raised below, is entirely baseless. It is well settled that three-judge-court statutes do not create district-court jurisdiction — they signify only that, if district-court jurisdiction otherwise exists, the case is to be "heard" by not one but three judges. *See, e.g., Ex parte Poresky*, 290 U.S. 30, 31 (1933) (*per curiam*); *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737 (9th Cir. 1954). Cablevision here makes its constitutional arguments in the course of an appeal from an order of the FCC. District courts lack jurisdiction over such an appeal: "exclusive jurisdiction" lies in the courts of appeals. 28 U.S.C. § 2342(1); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). Section 555(c)(1) has accordingly been interpreted to allow litigants like Cablevision to attack must-carry's constitutionality in a court of appeals.[2] In any event, even under the government's (mistaken) analysis, Section 555(c)(1) bars only "facial" challenges in a court of appeals. *Compare* Br. at 15 *with id.* at 8-9. As explained above, this is an as-applied challenge.[3]

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[2] *See A-R Cable Servs. — Me., Inc. v. FCC*, Civ. No. 95-134, 1995 WL 283861, at *5 (D. Me. May 10, 1995).

[3] If the Court nonetheless concludes that Section 555(c) divested the court of appeals of jurisdiction, it should grant, vacate, and remand so the court of appeals can consider whether it should transfer the case to district court pursuant to 28

Finally, the government relies on the state of the record below. It claims, for example, that Cablevision did not warn the FCC that its order would be subjected to "strict scrutiny," Br. 13; *see also id.* at 11 (same about argument that WRNN does not need must-carry). But the government confuses claims with arguments. As we explained below, this Court's "traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." C.A. Br. 16 n.21 (quoting *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)) (reproduced at Reply App. 34a). Presumably for that reason, the Second Circuit saw no waiver, thereby putting the matter to rest. *See* Pet. App. 22a-23a; *see also Lebron*, 513 U.S. at 379 (issue properly before this Court if it was "passed upon" by court below).

The government also claims (at 16-18) that the administrative record is too thin to permit review. This Court recently heard an as-applied challenge over precisely the same objection. *Compare Citizens United*, 130 S. Ct. at 894 *with id.* at 933 (Stevens, J., dissenting in part). The grounds for rejecting the objection are even stronger here. Cablevision's filing before the FCC made a comprehensive constitutional showing. *See* Reply App. 1a-20a. To be sure, the FCC and WRNN then largely ignored the constitutional arguments. But the FCC cannot ignore its burden of justifying an intrusion on speech rights,[4]

U.S.C. § 1631. *See, e.g., Pacyna v. Marsh*, 474 U.S. 1078 (1986).

[4] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I*"); *Century Communications Corp. v. FCC*,

and then, having done so, avoid review by complaining that the record is insufficient. Besides, quite apart from Cablevision's showing, the relevant facts are uncontested matters of public record. For example, the FCC conceded in 2006 — and again concedes here (Br. 18) — that "almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers," and can in many areas also choose among "emerging (*e.g.*, use of digital broadcast spectrum, fiber to the home, video over the Internet) delivery technologies." Reply App. 5a.

II. RESPONDENTS' SUBSTANTIVE DEFENSES LACK MERIT.

Respondents' merits arguments are largely unresponsive. As the petition demonstrated (at 18-19), *Turner*'s cornerstone was that, at the time, cable systems — as the only act in town — constituted a sufficient "bottleneck" to justify an intrusion on their editorial discretion. The core request here is that this Court decide whether must-carry obligations remain consistent with the Constitution now that consumers have a choice among video providers. The government does not dispute the factual predicate: it agrees (at 18) that "the cable industry is now subject to greater competition than at the time of this Court's decisions in *Turner I* and *Turner II*." That underscores the need for immediate review.

1. Nonetheless, the government urges (at 18-19), that "cable still controls two thirds of the market

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835 F.2d 292, 300 (D.C. Cir. 1987); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454-55 (D.C. Cir. 1985).

nationally" and that the "market penetration of [competitors]" may be "even lower" in certain regions. That misses the point. A high market share may have consequences for regulatory analysis.[5] But the First Amendment issue here turns on the existence of a bottleneck that supposedly would have allowed cable operators with anticompetitive motives costlessly to refuse to carry desirable over-the-air programming. Now that consumers can switch to competing sources, that "bottleneck" is gone. Perhaps the government would prefer to postpone review until cable's market share dips even further. But that lack of urgency is misplaced where "our most cherished liberties" are at stake. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381 (1973).

The government also suggests (at 19) that the emergence of competition is irrelevant because must-carry remains necessary to ensure that over-the-air viewers continue to have over-the-air choices. But that argument goes well beyond *Turner*'s rationale, which crucially depended on the absence of competition. Pet. 6-7, 8-9, 17-18. The government's alternate rationale is not only untested but also plainly wrong. Simply put, "when a

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[5] *But see Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009). The government relies on *Cablevision Systems Corp. v. FCC*, No. 07-1425, 2010 WL 841203 (D.C. Cir. Mar. 12, 2010), but that divided decision underscores the need for review here. The majority there noted that "the MVPD market has transformed substantially since the Cable Act was enacted in 1992." *Id.* at *7. A dissenting judge would have held that, in light of the "radically changed and highly competitive marketplace," the challenged cable regulation violated the First Amendment. *See id.* at *17 (Kavanaugh, J., dissenting).

market is competitive, direct interference with First Amendment free speech rights in the name of competition is typically unnecessary and constitutionally inappropriate." *Cablevision Sys. Corp.*, 2010 WL 841203, at *20 (Kavanaugh, J., dissenting). At a minimum, whether the government's alternate rationale can withstand scrutiny is a question worthy of this Court's attention.

Finally, WRNN (but not the government) argues that our core argument is unworthy of review absent a direct circuit conflict. WRNN Br. 16. But the petition explains (at 23) why such a conflict is unlikely to develop. And our core argument raises precisely the kind of important constitutional issue that this Court addresses even absent a conflict.

2. Respondents' attempted defense of the particular application of must-carry here cannot be reconciled with the First Amendment. As the petition explained (at 25), the purpose of must-carry was to ensure that over-the-air broadcast stations would remain available for over-the-air viewers. That rationale cannot justify a must-carry preference for a station that, like WRNN, has *no over-the-air viewers at all*.

WRNN previously conceded that it has no over-the-air viewers, Pet. 25-26, and makes no effort to retract that concession here. The government, by contrast, obfuscates by insisting that WRNN "has an audience in [Long Island] communities." Br. 10. But WRNN is carried by *satellite* operators, WRNN Br. 7-8, and the source on which the government relies (Pet. App. 45a) states that WRNN has *viewers*, not that it has *over-the-air* viewers. On that topic, WRNN's own concession is dispositive. That WRNN

is carried by Cablevision's competitors, moreover, underscores the absence of any justification for forcing Cablevision to displace its chosen programming. Consumers who want WRNN can switch providers. Such competitive pressures may cause cable operators to carry WRNN. Where competition gives viewers choices, the First Amendment does not allow the government to override editorial discretion.

Applying must-carry here is particularly absurd given that WRNN is seeking to extend its coverage far beyond its traditional over-the-air service area. Pet. 25-26. Must-carry thus has been transformed from a device to protect broadcasters' ability to reach existing viewers into a tool for cracking open entirely new markets. The government responds (at 8, 10) that WRNN is simply seeking the default carriage to which the must-carry statute entitles it. But the First Amendment does not allow intrusion on speech based on default rules that do not serve the statute's purpose. For that reason, the statute contains a market-modification safety valve intended to *prevent* stations from using must-carry to expand into new markets. 47 U.S.C. § 534(h)(1)(C).

Perhaps recognizing as much, the government urges (at 9) that facts relating to the particular broadcast station at issue are irrelevant to the constitutionality of applying must-carry. Under intermediate scrutiny, the government urges, any measure must be evaluated in terms of its "general effect," even in as-applied challenges. But that argument wrongly collapses the distinction between as-applied and facial challenges. This Court routinely sustains as-applied arguments just like the one ad-

vanced here.[6] The government commits the same error when attempting to address (at 10-12) the problem that financially secure WRNN does not need carriage on Long Island to remain on the air. Perhaps the Court did not require an individualized showing of need in *Turner*. But *Turner* involved a facial challenge — unlike the as-applied challenge here.

Besides, WRNN's lack of an over-the-air audience points to a broader problem. Since the 1990s, the number of over-the-air households has plummeted. Pet. 20. The FCC concedes that, four years ago, only 14% of households still relied on over-the-air broadcasting. *See* Br. 19-20. The government's interest in preserving over-the-air broadcasting dwindles with the over-the-air audience. The government contends that dwindling over-the-air viewership "makes carriage on cable systems even more critical to . . . ensur[e] that a 'multiplicity of broadcasters' are financially able to provide an alternative source of programming to the American public." But it cannot be that must-carry remains constitutionally unimpeachable so long as even a single over-the-air viewer remains. The dramatic decline in over-the-air viewership underscores the need for this Court to determine whether this intrusion on

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[6] *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("Even under . . . intermediate standard of review, however, Florida's blanket ban on direct, in-person, uninvited solicitation by CPA's cannot be sustained *as applied to Fane's proposed speech*.") (emphasis added); *United States v. Grace*, 461 U.S. 171, 183 (1983) (statute prohibiting carrying of banners was unconstitutional "as applied to . . . sidewalks" surrounding Supreme Court building).

First Amendment rights may continue.

The government argues (at 20), however, that, as must-carry has become less needed, it has also grown less burdensome — in that cable operators have found ways of transmitting more video signals through the same wires. But, in assessing a burden on editorial discretion, the amount of cable spectrum occupied by a must-carry station is no more dispositive than the column space allocated to a required newspaper article. Besides, the existence of countervailing developments (like bandwidth-intensive high-definition programming) make this case particularly worthy of the Court's attention.

Finally, the FCC disputes neither that it weighed WRNN's speech content when considering whether to impose must-carry here nor that content-discrimination would render the FCC's order subject to strict scrutiny. Instead, the government argues that the FCC "did not consider WRNN's programming to determine whether it agreed or disagreed with the ideas or views expressed." Br. 14 (quotation marks omitted). But "[r]egulation of the *subject matter* of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation." *Hill v. Colorado*, 530 U.S. 703, 723 (2000) (emphasis added).

In closing, a word about WRNN's submission. Despite its unsubstantiated accusations,[7] WRNN

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[7] For example, WRNN urges (at 21, 32) that Cablevision declined to carry WRNN in an effort to protect its own News12 and Newsday from competition. Suffice it to say that WRNN flatters itself when it suggests that its home-shopping fare competes with News12's news programming and that Cablevi-

confirms (at 7-8) that it moved its transmitter and added Long Island-targeted programming in an effort to gain must-carry rights. This is what must-carry has come to: a home-shopping station's tool to manufacture cable carriage in far-away markets at C-SPAN's expense. Unless this Court intervenes, WRNN's effort will bear fruit in just a matter of weeks. The Court should prevent that First Amendment monstrosity by agreeing to consider the constitutionality of must-carry in this case.

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sion did not even acquire Newsday until long after the issuance of the order under review.

CONCLUSION

The petition should be granted.

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April 13, 2010

APPENDICES

APPENDIX A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WRNN License Company, LLC

For Modification of the Television Market For
WRNN-DT, Kingston, New York

Facility Id. No. 74156

CSR 6956-A

OPPOSITION OF
CABLEVISION SYSTEMS CORPORATION

* * *

February 13, 2006

* * *

III. EXTENDING WRNN'S CARRIAGE RIGHTS WOULD IMPOSE SERIOUS BURDENS ON CABLE SPEECH WITHOUT COUNTERVAILING PUBLIC INTEREST BENEFITS AND WOULD NOT MATERIALLY ADVANCE ANY GOVERNMENT INTEREST

The Supreme Court recognized in *Turner* that "there can be no disagreement" about the "initial premise" that "cable operators engage in and transmit speech, and they are entitled to the protections

of the speech and press provisions of the First Amendment."[198] The Court further concluded that "the must-carry rules regulate cable speech."[199] As such, in order to survive First Amendment scrutiny, must-carry burdens must "serve important government interests 'in a direct and effective way,'"[200] and must be narrowly tailored not to "burden substantially more speech than is necessary to further"[201] the government interests served by must-carry.

Must-carry was intended "to serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television; (2) promoting the widespread dissemination of information from a multiplicity of sources; and (3) promoting fair competition in the market for television programming."[202] However, in ruling to uphold must-carry, the Court determined that these interests were subsumed in the "overriding congressional purpose" of "'protecting non cable households from loss of regular television broadcasting service due to competition from cable systems.'"[203] The Supreme Court

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[198] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*").

[199] *Id.* at 637.

[200] *Turner II*, 520 U.S. at 213 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

[201] *Turner I*, 512 U.S. at 662.

[202] *Turner II*, 520 U.S. at 189 (internal citations omitted).

[203] *Turner I*, 512 U.S. at 647 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)). This purpose built upon the long-standing "basic tenet of national communications policy that 'the widest possible dissemination of informa-

agreed that this objective – protecting free, over-the-air television from economic injury resulting from cable operators' refusal to carry broadcast signals – qualified as "important" for purposes of intermediate scrutiny. As the Commission explained in its brief to the Second Circuit in 1998:

> Must carry was implemented to help restore broadcast stations in a cable-dominated world to the position they were in before cable became the "dominant nationwide video medium." 1992 Cable Act § 2(a)(3). Restoration of that status serves two related purposes: first, viewers with cable will continue to be able to watch broadcast stations on cable even after disconnecting their television antennas; second, cable carriage will preserve the stations' revenue base, allowing over-the-air viewers who cannot afford cable to continue to be able to receive broadcast stations. In other words, must carry was intended to "*preserve* the *existing structure* of the Nation's broadcast television medium." *Turner I*, 512 U.S. at 652 (emphasis added). *See also id.* at 623 ("Congress wanted "to *preserve* access to free television programming for the 40 percent of Americans without cable").[204]

As a content-neutral government regulation of speech, must-carry could be sustained only if it furthered these interests in a manner that would be

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tion from diverse and antagonistic sources is essential to the welfare of the public.'" *Turner II*, 520 U.S. at 192.

[204] Brief for Respondents at 27, *WLNY-TV v. FCC*, 163 F.3d 137 (2d Cir. Jan. 22, 1998) (No. 97-4243) (footnotes omitted, emphasis in original).

achieved less effectively absent the statute, and its resulting burdens on speech were narrowly tailored so as not to burden substantially more speech than was necessary to further that interest.[205] The *Turner II* court narrowly found that must-carry satisfied that test, after analyzing the market for distribution of programming at the time of the decision.

Since 1992, however, the market for distribution of programming has fundamentally changed. In *Turner II*, the specific facts relied upon by the Supreme Court in finding a rational justification for must carry were that in 1992: (1) 40% of the public relied solely upon over-the-air broadcasts;[206] (2) cable operators possessed a local monopoly over cable households, and only one percent of communities were served by more than one cable system;[207] (3) cable systems had little incentive to carry, and a significant incentive to drop, broadcast stations;[208] (4) predictive economic evidence suggested that denying carriage to broadcast stations would be rational for cable, since a cable company could theoretically drop a broadcast station without losing a substantial number of subscribers;[209] and (5) the burden of must-carry was "modest" since most cable operators had excess capacity to dedicate to carriage

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[205] *Turner I*, 512 U.S. at 661-662.

[206] *Turner II*, 520 U.S. at 190.

[207] *Id.* at 197.

[208] *Id.* at 201.

[209] *Id.* at 202.

of additional broadcast channels.[210] None of those facts is true today:

- 14% of households today rely on over-the-air broadcasting, far below the 40% that did so in 1992.[211]
- Contrary to the "local monopoly" for cable found in 1992, the FCC found in 2005 that "[t]oday, almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers. In some areas, consumers may also choose between other traditional (*e.g.*, broadcasting, cable, DBS) and emerging (*e.g.*, use of digital broadcast spectrum, fiber to the home, video over the Internet) delivery technologies as well."[212]
- Congress's belief in 1992 that cable operators have no incentive to carry, and every incentive to drop, broadcast stations has been proven false, with the FCC recognizing in 2004 that "carriage of local television broadcast station signals is critical to MVPD offerings" and that broadcasters possess market power in their local markets that can be wielded to disadvantage cable.[213]

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[210] *Id.* at 214.

[211] *See* News Release, "*FCC Issues 12th Annual Report to Congress on Video Competition*" (rel. Feb. 10, 2006).

[212] *Id.*

[213] *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, MB Docket 03-124, Memorandum Opinion and Order, 19 FCC Rcd. 473, 565, ¶¶ 201-202 (2004).

- Congress's economic prediction that cable operators could drop broadcast stations with little fear of losing subscribers has been proven false, and since 1992 both Congress and the FCC have done an about-face to recognize that carriage of local broadcast signals is essential if an MVPD is to attract and retain subscribers.[214]
- The Court's finding in *Turner II* that must-carry would impose only a modest burden due to excess channel capacity on cable systems cannot be supported in 2006, when a cable system must allocate its scarce capacity among numerous broadcast stations, over 500 nationally available programming networks,[215] nearly 100 regional networks, and other, new uses for the cable plant such as satisfying consumers' ever-increasing demand for Internet bandwidth over its cable plant and meeting demand for new Voice over Internet Protocol ("VoIP") service.

The market in which consumers view television in 2006 bears almost no resemblance to the market in 1992. Most significantly, the *Turner* rationale depended upon the Court's determination that cable was not subject to effective competition. As noted above, the Commission has acknowledged that this circumstance is no longer true. Consequently, cable television no longer poses a threat to free, over-the-

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[214] *Id.* (discussing Congress's grant of local rebroadcast rights to DBS carriers in SHVIA, and the actual market effects that followed, including greater subscriber gains in areas where DBS providers offer local broadcast stations).

[215] *See* News Release, "*FCC Issues 12th Annual Report to Congress on Video Competition*" (rel. Feb. 10, 2006) at 4.

air broadcast television. Moreover, the broadcasters whom Congress found required protection from cable's local market power in 1992 now own the largest share of cable programming networks and use their own local market power — derived from the "must-have" status of their local broadcast signals — to impose monopoly rents on cable systems and indirectly on cable customers and to leverage that market power to the benefit of their own programming networks.[216] It appears that either the 1992 Cable Act worked too well, or that broadcasting is simply an extraordinarily lucrative business regardless of its regulatory environment. In either case, the justifications for must-carry accepted by the Supreme Court in *Turner II* no longer exist.

A. Mandatory Carriage of Home Shopping/Infomercial Stations With Negligible Over-The-Air Viewership is Unconstitutional.

Even if must-carry would be found constitutional today despite the significant developments described above, required must-carry of home shopping/infomercial stations with negligible over-the-air viewership clearly cannot survive First Amendment scrutiny under *Turner*. When it enacted the must-carry law, Congress was concerned that forcing cable operators to devote channel space to

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[216] For example, the "big four" broadcasters (ABC, CBS, NBC, and Fox) today own ten of the fifteen top-rated non-broadcast networks, compared to only three of the fifteen ten years ago. *Id.* at 2902, Table C-7; KAGAN, ECONOMICS OF BASIC CABLE NETWORKS 60 (2005); KAGAN, ECONOMICS OF BASIC CABLE NETWORKS 39-40 (1996).

broadcasters whose programming was mainly home shopping and infomercials was an undue burden and would not advance the purposes of must-carry. Indeed, Congress could not reach agreement over whether such broadcasters should even be entitled to hold licenses *at all*, given the dubious nature of the claim that such broadcasters serve the public interest. It therefore directed the Commission to determine "whether home shopping broadcast stations are serving the public interest, convenience, and necessity."[217] The Act specified three factors to be considered by the Commission in drawing its conclusion: (1) the viewing of home shopping stations by the public; (2) the level of competing demands for the spectrum allocated to such stations; and (3) the role of such stations in providing competition to non-broadcast services offering similar programming.[218]

The Commission considered these factors and determined that home shopping stations serve the public interest and therefore, are entitled to must-carry. Interestingly, one rationale for this decision was a concern among Commissioners that denying must-carry for home shopping stations would suggest that must-carry was content-based and therefore subject to strict scrutiny in the then-ongoing

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[217] *See Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, Home Shopping Station Issues*, MM Docket No. 93-8, Report and Order, 8 FCC Rcd. 5321, 5321, ¶ 2 (1993) ("*Home Shopping Order*").

[218] 47 U.S.C. § 533(g).

Turner litigation.[219] Whatever the validity of that decision at the time, it cannot withstand scrutiny today. In light of developments since 1993, there is no support under the statutorily prescribed factors for a finding that home shopping broadcast stations serve the public interest and are therefore entitled to must-carry.[220] Indeed, the same facts that dem-

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[219] *See, e.g., Home Shopping Order* at 5333 (Separate Statement of Chairman James H. Quello) ("I am concerned that a decision in this proceeding to exclude home shopping stations from must carry status solely because of their content would have jeopardized the legal defense of the must carry rules."); *id.* at 5340 (Separate Statement of Commissioner Ervin S. Duggan) ("My colleague Chairman Quello has fought the must-carry battle valiantly throughout his career at the Commission; I know that he cares deeply about it, and I share his concern that we not damage must-carry's ultimate defense. Nonetheless, I believe we could have reached a different outcome in this proceeding without harming the overall must-carry scheme. I regret that we have not done so.").

[220] Indeed, given Congress's concern about devoting spectrum to home shopping station licenses, as demonstrated by its directive that the Commission consider whether the spectrum was needed for other uses, a different result is all but assured. The demand for spectrum since the 1992 Cable Act has skyrocketed. Given the exponential growth since 1993 of spectrum-intensive services such as CMRS and advanced services, and the fact that Congress has attempted to wrest back from broadcasters all analog spectrum in order to meet numerous demands, including an urgent need for use of the spectrum by first responders and other public safety uses, there are clearly many, higher and better competing demands for the spectrum occupied by home shopping broadcast stations. *See, e.g.*, Ted Hearn, *McCain Pushes Earlier Analog Cutoff*, MULTICHANNEL NEWS, Oct. 18, 2005, *at* http://www.multichannel.com/article/CA6275465.html (reporting that Sen. John McCain recently expressed concern that spectrum be freed "quickly for use by

onstrate home shopping stations could not meet the statutory test for carriage also demonstrate that mandated carriage of those stations cannot pass constitutional muster.

Today, carriage of such stations — and particularly, unwatched home shopping/ infomercial stations like WRNN — fails to advance *any* of the purposes of must-carry. And any remote connection such carriage shares with one of the stated purposes cannot be described as furthering those purposes in a "direct and material" way. Thus, the burdens imposed by granting home shopping/infomercial stations with negligible over-the-air viewership must-carry rights would far outstrip the benefits attained thereby. As such, interpreting the must-carry rules to require carriage of such stations would contravene the requirement that a content-neutral government regulation of speech be "narrowly tailored" to promote the government interest served by the regulation and would thus be an unconstitutional burden on cable speech.[221]

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first responders who require dependable crisis communications" and noting that "[m]aking that spectrum available was recommended by the 9/11 Commission").

[221] Significantly, in performing the second part of the *O'Brien* inquiry related to whether the must-carry rules do not "burden substantially more speech than is necessary to further" the government interest implicated by such rules, the Court stated "[b]ecause the burden imposed by must carry is congruent to the benefits it affords, we conclude must carry is narrowly tailored to preserve a multiplicity of broadcast stations *for the 40 percent of American households without cable*." *Turner II*, 520 U.S. at 215-16. Given the significant reduction in the percentage of American households without cable, the

B. Carriage of Home Shopping/Infomercial Stations With Negligible Over-the-Air Viewership Does Not Preserve Over-The-Air Television.

Allowing must-carry rights for home shopping/infomercial stations with negligible over-the-air viewership burdens far more speech than necessary to further the government's general interest (assuming such an interest still exists) in preserving over-the-air broadcasting. There was scant direct evidence in 1993, when 40% of the public relied solely upon over-the-air television broadcasting, that any significant portion of the public viewed over-the-air home shopping broadcasts.[222] It was primarily due to the lack of evidence to the contrary that the Commission determined that there was likely significant viewership.[223] Today, however, only a small portion of the public utilizes over-the-air broadcast television at all,[224] and there is no evidence that any significant — or even measurable —

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benefits derived from must-carry have been concomitantly reduced. Under current conditions, therefore, logic requires that to survive constitutional scrutiny, must-carry must be tailored far more narrowly than it was under *Turner II*. As such, the Commission should not grant must-carry to digital-only home shopping stations.

[222] *Home Shopping Order* at 5322, ¶¶ 5-6 (discussing lack of ratings data and relying upon increased sales via infomercial as indicative of viewership). As discussed above, n.167, sales records are not good indicators of viewership.

[223] *Id.*

[224] *See* News Release, "*FCC Issues 12th Annual Report to Congress on Video Competition*" (rel. Feb. 10, 2006) (14% of households view television only over-the-air).

portion of those consumers tune in to broadcast home shopping channels. Indeed, as discussed *supra*, WRNN admitted to the Commission in 2004 that it had "no reportable over-the-air viewing" of its analog signal.

The case for carrying home shopping/infomercial stations to preserve their over-the-air viewership is even less persuasive in the case of a digital station like WRNN. It is highly unlikely that *even a single viewer* anywhere in the New York area views WRNN over-the-air. As noted above, over-the-air digital television households currently represent only about 0.1% of all television households, of which only about 9,500 households are likely located anywhere in the entire New York DMA, and of which only about 577 households are likely to be in the Communities; therefore, an insignificant number of households in the Communities even have the potential to receive WRNN's digital signal over-the-air. Under such circumstances, the consequence of granting the Petition would be to vastly increase in the number of viewers with access to WRNN and would have no connection with the purpose of "preservation"[225] that underlies the constitutional justification of must–carry. Granting the Petition will not in any way serve to "ensure that broadcast televi-

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[225] *Turner I*, 512 U.S. at 623 and 652 ("In short, the must-carry provisions . . . are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems. In enacting the provisions, Congress sought to preserve the existing structure of the Nation's broadcast television medium . . . and, in particular, to ensure that broadcast television remains available as a source of video programming for those without cable.").

sion remains available as a source of video programming for those without cable."[226] In particular, it will not provide any benefit to viewers without cable — "the immediate . . . beneficiaries of efforts to preserve broadcast television."[227] Virtually no non-cable viewers will get access to WRNN programming by virtue of grant of the Petition.

Even when WRNN's signal is imported to a cable system, it is not available to analog basic tier subscribers without downconversion from digital to analog. In such an instance, it is a perversion of Congress's intent in the 1992 Cable Act to require cable operators to provide a channel slot on the basic tier for a downconverted signal that is not practically available to over-the-air households, had no measurable over-the-air viewership when it was, and is not even viewable by analog basic cable subscribers without technical manipulation to make it so.

In particular, required carriage of such stations on the basic tier[228] results in an even greater burden to cable systems and far less of a fit between must-

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[226] *Turner II*, 520 U.S. at 231.

[227] *Turner II*, 520 U.S. at 205.

[228] The Commission requires that pre-digital transition, cable systems downconvert digital must-carry signals to analog and carry them on the basic tier upon the station's request. *See WHDT-DT, Channel 59, Stuart Florida; Petition for Declaratory Ruling that Digital Broadcast Stations Have Mandatory Carriage Rights*, 16 FCC Rcd. 2692, 2769 ¶ 14 (2001); *Carriage of Digital Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, 16 FCC Rcd. 2598, 2643 ¶ 102 (2001).

carry's stated goals and means. Requiring Cablevision to carry WRNN on the basic tier would result in a vast expansion of the station's potential audience, since its signal currently has virtually no potential over-the-air audience.[229]

As a result of the foregoing, granting the Petition would significantly increase the burdens imposed by must-carry without in any way furthering the purposes served by such rules.

C. Carriage of Home Shopping/Infomercial Stations With Negligible Over-the-Air Viewership Does Not Increase Diversity On The Cable System.

Carriage of home shopping/infomercial stations, like WRNN, does not increase the diversity of voices on the cable system and in fact actually reduces the programming and services available to consumers by offering a duplicative service.

WRNN obtains much of its programming through arrangement with Jewelry TV, a national programming network already available on cable systems and other multichannel video programming services throughout the country. Mandated carriage of duplicative home shopping programming on a cable system undermines the very diversity interests that Congress sought to promote. Cable viewers already receive almost all of WRNN's content — and indeed, significantly more local news and locally-oriented

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[229] As a result, if the Commission were to grant the Petition, it should not require carriage of WRNN in downconverted format on Cablevision's basic tier; carriage on a tier available to all basic tier customers with a digital box should suffice.

programming — from other broadcast stations and services carried on the Systems.

Moreover, forcing cable operators to dedicate channel space to unwatched, duplicative programming actually reduces diversity on the cable system. Carrying home shopping stations like WRNN — a station with admittedly no measurable broadcast audience and indeed no measurable viewership in the entire New York DMA — requires Cablevision to displace another programmer for which there is greater public demand or which otherwise enhances the value of the Cablevision offering. The burden on Cablevision's free speech rights by refusing it this freedom is substantial, since the number and variety of non-broadcast networks has expanded much more rapidly than has Cablevision's ability to add channel capacity to its systems.

Carriage of home shopping stations also reduces diversity in a manner not evaluated in *Turner* by precluding the cable operator from using the channel space to offer more innovative programming services such as new interactive services, or new products and services such as voice, high-speed Internet access, video on demand (VOD), or other advanced uses that increase the diversity of voices and offerings on the cable system. Such new services play an essential role in promoting competition in the communications industry and their continued expansion furthers a fundamental communications policy objective.[230] Yet such services utilize the same band-

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[230] 47 U.S.C § 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.").

width that would have to be dedicated to the carriage of unwatched home shopping/infomercial stations if must-carry is deemed to continue to require it. Consequently, such an interpretation of the must-carry rules will create inefficiencies in the market for important digital technologies and will hinder the ability of consumers to obtain highly desired services, such as high-speed Internet access and VoIP telephony.

D. Carriage of Home Shopping/Infomercial Stations With Negligible Over-the-Air Viewership Does Not Promote Competition.

The role that home shopping/infomercial stations played to provide competition to nonbroadcast services offering similar programming has plummeted since passage of the 1992 Cable Act. There can be no serious argument that broadcast home shopping/infomercial stations provide measurable competition to non-broadcast home shopping networks. Indeed, this is the very reason that WRNN leases a substantial portion of its programming day to Jewelry TV, and why it seeks to expand its coverage to position itself as a "regional" home shopping network.[231]

Indeed, the primary competitors to non-broadcast home shopping networks are Internet retailers, not

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[231] Moreover, to the extent this interest continues to be valid, denial of the Petition would not harm its intent. Lack of WRNN's carriage here is not due to any anticompetitive action by the cable system, but due to a legitimate decision by the Commission limiting WRNN's must-carry rights to an area that accurately reflects its local market.

broadcast home shopping/infomercial stations. As viewership of over-the-air broadcast television has dwindled (and, in the case of WRNN, completely evaporated), retail sales over the Internet have exploded. According to comScore, Internet retail sales rose 24% just between 2004 and 2005, amounting to $81.6 billion dollars in 2005 — well more than *one billion dollars per week*.[232] The near-complete evaporation of over-the-air home shopping stations' ability to provide any competitive check whatsoever on non-broadcast home shopping networks, and the rise of Internet and catalog sales as the primary competitors to home shopping channels, demonstrate that mandated carriage of home shopping/infomercial stations does not materially advance the purposes of must-carry.[233]

This is not a situation where "the burden imposed by must-carry is congruent to the benefits it affords," as the Supreme Court found to be the case for must-carry in general in 1992. *Turner II*, 520 U.S. at 215. A grant of must-carry rights to WRNN in this circumstance would place serious burdens on Cablevision speech that do not directly further any of must-carry's stated purposes. Grant of the Peti-

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[232] *See, e.g.*, www.internetretailer.com

[233] The growth of the Internet also protects against the Commission's concern that "home shopping stations provide an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner." *Home Shopping Order* at 5327, ¶ 28. Given the extraordinary variety of goods available over the Internet and the ease of the purchasing process, it is doubtful that home shopping stations continue to perform this function meaningfully today.

tion would therefore be an unconstitutional application of the must-carry provision of the 1992 Cable Act under the test established in *Turner I* and *Turner II*.

IV. GRANT OF WRNN'S PETITION WOULD EFFECT AN UNCONSTITUTIONAL TAKING OF CABLEVISION'S PROPERTY

It is well understood that channel capacity is the essence of the cable operator's property. Approval of WRNN's Petition to require Cablevision to provide a non-local broadcaster with permanent channel space would effect a *per se* regulatory and physical taking of this property in violation of the Fifth Amendment.[234]

As noted constitutional scholar Laurence Tribe has explained:

> Must carry rules do not simply regulate the manner in which cable operators use their systems. Rather, they effectively condemn a portion of cable operators' property and *turn it over to third parties* who are entitled to exclusive use of the channels in question on a continuing basis. This system is effectively the exercise of eminent domain power over a portion of the cable system. The power to exclude others from one's property is a traditional property right. . .[235]

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[234] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (Finding that the government's partial taking and occupation of a rooftop in order to provide tenants cable access constituted a *per se* taking).

[235] Laurence H. Tribe, *Why the Commission Should Not Adopt a Broad View of the 'Primary Video' Carriage Obliga-*

A decision in favor of WRNN would deprive Cablevision of "economically beneficial us[e]" of its property, a *per se* taking.[236] Forcing Cablevision to satisfy must-carry obligations for non-local broadcast stations deprives it of "economically beneficial use" of its channel space, particularly given WRNN's lack of viewership. This is the case even if that taking is "partial" or "minor."[237] Moreover, because a finding that the Systems are properly in WRNN's market could be used in support of additional market modification petitions from other distant broadcasters, the approval of WRNN's petition would, in effect, open the door to significant additional must-carry obligations. As Professor Tribe concluded, "[g]iving broadcasters exclusive use of multiple cable channels on a continuing basis is at least as clearly a taking as is granting cable operators the more visible but far less economically viable right to attach their wires to a small corner of a

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tion, submitted in CS Docket No. 98-120 (July 9, 2002) at 12-13 (citing *Loretto*, 458 U.S. at 435; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 830-32 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)).

[236] *Lucas v. South Carolina Coast Council*, 505 U.S. 1003, 1019 (1992) (an owner that "sacrifice[s] all economically beneficial uses in the name of the common good... has suffered a taking."); *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2081 (2005) (whether the taking "substantially advances" the government's interest is not an appropriate inquiry for a Fifth Amendment takings claim).

[236] *Lucas v. South Carolina Coast Council*, 505 U.S. 1003, 1019 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 824, 834 (1987). *See also* Tribe, *supra* note 229, at 13.

[237] *Penn. Central Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

building's roof or requiring local exchange carriers to permit physical co-location on their premises."[238]

Cablevision has invested millions of dollars in its network to provide quality cable and other advanced services to its subscribers. These investments have significantly helped Congress's and the Commission's efforts to promote broadband — indeed, Cablevision is consistently recognized as a leader in digital subscriber penetration. Forcing Cablevision to turn over any part of that investment for use by a broadcaster located in Kingston, N.Y., 150 miles from the Communities, is a clear violation of the Takings Clause.[239]

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[238] Tribe, *supra* note 229, at 13-14 (comparing must-carry to *Loretto* and *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1996), two cases in which the court found a regulatory taking).

[239] *See* Tribe, *supra* note 229, at 15 ("The constitutional principle is the same whether the transfer is accomplished wholesale or piece by piece.").

APPENDIX B

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 07-5553-ag

CABLEVISION SYSTEMS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

BRIEF FOR PETITIONER (Final Version)

* * *

February 8, 2008

* * *

III. THE FCC ERRED BY COMPELLING CARRIAGE IN VIOLATION OF CABLEVISION'S CONSTITUTIONAL RIGHTS.

A. Compelled Carriage of WRNN on Long Island Cannot Withstand a First Amendment Challenge.

In the *Turner* litigation, the Supreme Court upheld the must-carry statute against a facial challenge.[135] A facial challenge is "the most difficult challenge to mount successfully, since the chal-

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[135] *See Turner I*, 512 U.S. at 671, 673.

lenger must establish that no set of circumstances exists under which the Act would be valid."[136] The *Turner* Court therefore did not, and could not, hold that must-carry obligations would be constitutional in all circumstances. Thus, nothing in *Turner* bars this Court from holding that compelled carriage of WRNN on Long Island violates the First Amendment on an as-applied basis.[137]

Congress enacted the must-carry statute based on a specific rationale: that cable operators should be prevented from harming the existing system of localism by depriving broadcasters of their audience.[138] That was also the theory on which the Supreme Court upheld the statute against facial attack: by the narrowest of margins, the Court held that the rationale was not content-based and therefore did not trigger strict scrutiny, and that the rationale was sufficiently weighty to justify the statute under intermediate scrutiny. As shown below, the reasoning on which the Supreme Court relied in the *Turner* cases cannot justify carriage here.[139]

First, and most fundamentally, unlike the *Turner* rationale, which granted carriage without examin-

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[136] *United States v. Salerno*, 481 U.S. 739, 745 (1987).

[137] *See Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 184 (2d Cir. 2006) ("a finding of facial constitutionality does not foreclose 'as-applied' challenges.").

[138] *See supra*, pp. 9-10.

[139] No alternative rationale to justify carriage in this case has ever been suggested. Given that must-carry even when justified under the *Turner* rationale survived by only the narrowest margin, it is not plausible that any alternative rationale could support carriage here.

ing a station's programming content, the order under review is quite explicit in saying that WRNN is granted carriage rights because of the supposedly Long Island-targeted nature of its programming.[140] As such, the order rests on a rationale that is openly content-based, thereby triggering strict scrutiny.[141] In the *Turner* litigation, the Supreme Court sidestepped the question whether the consideration of programming content in the context of market-modification proceedings subjected the entire statute to strict scrutiny, finding that the parties had not raised that question.[142] Strict scrutiny cannot be side-stepped here. And no credible argument can be made that the order under review can withstand strict scrutiny: plainly, it is not narrowly tailored to a compelling interest.

Second, even if only intermediate scrutiny applied, the *Turner* rationale would not work on the facts presented. The *Turner* rationale contemplated the protection of noncable households from "loss of regular television broadcasting service due to competition from cable systems."[143] Thus, the Supreme Court approved a measure that guaranteed broadcasters the audience they would have had in a world

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[140] *See 2007 Order* ¶ 4.

[141] *See Turner I*, 512 U.S. at 642.

[142] *See id.* at 643 n.6 ("the District Court did not address this provision"); *id.* at 676-77 (O'Connor, J., dissenting) (arguing that Section 614(h)(1)(C)(ii)'s concern with "localism" indicates that the statute's "preference for broadcasters over cable programmers is justified with reference to content").

[143] *See Turner I*, 512 U.S. at 663.

without cable — not a measure granting them access to a new and expanded audience.

If Congress had enacted a broader measure (requiring cable systems to carry, say, broadcast stations from all over the country), the Supreme Court could not have approved it. To be sure, the broader measure would have helped preserve broadcasting: it would have given broadcasters access to a larger audience. But the measure would also have constituted a naked preference for one kind of speaker (broadcasters) over others (cable operators and cable programmers). Such a preference would have triggered strict scrutiny under the settled principle that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others."[144]

That principle did not doom the must-carry statute as enacted only because the Supreme Court concluded that Congress had sought to accomplish a goal that was not "concerned with the communicative impact of the regulated speech"[145] — namely to protect broadcasters from cable-inflicted peril.[146] That theory is unavailable insofar as carriage is compelled outside of a station's natural market (*i.e.*, the market it would have in a world without cable). Thus, any measure that grants carriage to a station outside of its natural market triggers strict scrutiny.

Third, the *Turner* rationale contemplated the preservation of broadcast signals for the benefit of

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[144] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

[145] *Turner I*, 512 U.S. at 658.

[146] *Id.* at 659.

over-the-air viewers.[147] But, even when WRNN was still broadcasting in analog format, WRNN lacked any over-the-air audience — not only on Long Island, but even in Kingston.[148] Since then, WRNN has apparently sold off its analog over-the-air spectrum. There are virtually no consumers that have off-air antennas and digital equipment necessary to receive digital signals.[149] At best, then, WRNN's over-the-air audience is *de minimis*.

Granting preferential cable-carriage rights to WRNN therefore cannot be grounded in the *Turner* rationale. If WRNN has no over-the-air viewers, seeking to protect them cannot be a governmental objective that qualifies as rational, let alone as important. As the D.C. Circuit put it in connection with a station that likewise lacked an over-the-air audience: "[T]he rule is completely adrift from its economic rationale. The affected cable system could

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[147] *See, e.g., id.* at 663 ("protecting noncable households from loss of regular television broadcasting service due to competition from cable systems is an important federal interest") (internal quotation marks omitted).

[148] *See WRNN-TV Assocs.*, 19 FCC Rcd 12343, 12344 (MB 2004) ("WRNN-TV Limited acknowledges that early return of its NTSC channel will result in loss of an over-the-air analog service, but contends that the impact on the public will be imperceptive since, according to Nielsen Media Research, there was no reportable over-the-air viewing for the station for the month of April 2004.").

[149] *See, e.g., Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, MB Docket No. 04-210, 2005 WL 473322, at *1 n.4 (MB rel. Feb. 28, 2005).

not possibly have been injuring the benefitted broadcaster by fragmenting its audience."[150]

Fourth, the *Turner* rationale vitally depended on the notion that cable operators were able to deny broadcasters carriage for anticompetitive reasons — supposedly because cable operators were unconstrained by competition.[151] The apparent thinking was that, at the time, cable operators could drop even popular broadcast signals without having to worry about subscriber losses: because there was no competition, consumers had no other place to go.

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[150] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1461 n.54 (D.C. Cir. 1985).

[151] *See Turner I*, 512 U.S. at 649 ("Congress designed the must-carry provisions . . . to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming"); *id.* at 661 ("The must-carry provisions . . . are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."); *id.* at 669-70 (Stevens, J, concurring in part and concurring in the judgment) ("The must-carry provisions are amply justified by special characteristics of the cable medium, namely, the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television. Cable operators' control of essential facilities provides a basis for intrusive regulation that would be inappropriate and perhaps impermissible for other communicative media.") (internal quotation marks and brackets omitted); *Turner II*, 520 U.S. at 197 ("cable operators possess a local monopoly over cable households"); *id.* at 227 (Breyer, J., concurring in part) ("a cable system . . . at present (perhaps less in the future) typically faces little competition").

Real-world market conditions on Long Island today could not be more different.[152] There are two providers of Direct Broadcast Service (DBS), DirecTV and Dish Network, which provide a multichannel package that is similar to the package provided by cable operators like Cablevision. In just over a decade, DBS's market share has grown from zero to about 30%.[153] In addition, telephone companies have begun providing multichannel video service,[154] including, as the order under review itself observes, on Long Island.[155] Verizon is investing bil-

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[152] *See* Opp. at 54 (A 325); *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, News Release, at 3 (Nov. 27, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf.

[153] *See FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, News Release, at 3 (Nov. 27, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf ("DBS subscribers comprise the second largest group of MVPD households, representing 29 percent of total MVPD subscribers as of June 2006.").

[154] *See* Verizon Communications Inc., Press Release, *Verizon Reports Continued Success in 3Q 2007*, Oct. 29, 2007, *available at* http://investor.verizon.com/news/view.aspx?NewsID=863 (reporting that, as of the end of the third quarter of 2007, Verizon had approximately 717,000 subscribers to its FiOS TV service (an increase of approximately 600,000 over the past 12 months), and its fiber-to-the-home FiOS network passed 8.5 million premises).

[155] *See 2007 Order* ¶ 4 n.15 ("Verizon carries WRNN-DT on its systems in Massapequa Park, Oyster Bay and Hempstead, New York.").

lions of dollars in its video service,[156] and analysts have observed that, of all cable operators, Cablevision is most squarely caught in Verizon's crosshairs.[157] In sum, Long Island in 2008 shows a competitive landscape that was unimaginable at the time of *Turner*. It is therefore not plausible to suppose that Cablevision could profitably act on anticompetitive incentives.[158]

Fifth, there is no evidence whatsoever that Cablevision has declined to carry WRNN with a view to stifling competition.[159] Cablevision declines to carry the home-shopping station because it has no audience: people are not interested in watching it. By any measure, Cablevision can make better use of the cable spectrum that would be required to carry WRNN. It is worth noting that, when Congress en-

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[156] *See, e.g.*, Verizon Communications, Inc., News Release, *Verizon Provides New Financial and Operational Details on Its Fiber Network as Deployment Gains Momentum*, Sept. 27, 2006, available at http://newscenter.verizon.com/press-releases/verizon/2006/verizon-provides-new.html (reporting that Verizon "expects to invest $18.0 billion in net capital from 2004 through 2010 in deploying [FiOS]").

[157] *See, e.g.*, Peter Grant & Dionne Searcey, *Verizon's FiOS Challenges Cable's Clout*, Wall St. J., Oct. 24, 2007, A12 ("Cablevision clearly is in the front lines of the FiOS battle. Already 25% of the homes it serves are exposed to FiOS service compared with about 4% for Comcast and Time Warner Cable Inc.").

[158] *See, e.g.*, *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) ("in [justifying another set of rules based on the assumption that cable operators had market power] the Commission will have to take account of the impact of DBS on that market power").

[159] *See* Opp. at 62 n.231 (A 333).

acted the must-carry statute, it specifically carved out home-shopping stations, leaving it to the FCC to decide whether those stations should have must-carry rights — or, indeed, broadcast licenses at all.[160] Although the FCC in 1993 ruled that home-shopping stations should have must-carry rights, it recently initiated a proceeding to reconsider that conclusion.[161]

Finally, the *Turner* rationale posited that "broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether."[162] The record is entirely devoid of any evidence that, without carriage on Long Island, this fate will befall WRNN. To the contrary, WRNN has been on the air for more than 22 years and has prospered even without carriage on Long Island — so much so that it was able to fund expensive changes to its signal and programming without any guarantee of broader carriage. To defend must-carry against a facial challenge, it may have been enough for the FCC to show that, without must-carry, financial hardship would have been suffered by many television stations.[163] In the face of an as-applied challenge, more

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[160] 47 U.S.C. § 534(g)(1).

[161] *Commission Seeks To Update the Record for a Petition for Reconsideration Regarding Home Shopping Stations*, Public Notice, 22 FCC Rcd 8550 (2007).

[162] *Turner I*, 512 U.S. at 666 (plurality).

[163] *But see Turner I*, 512 U.S. at 682 (O'Connor, J., dissenting) ("If Congress wants to protect those stations that are in danger of going out of business, or bar cable operators from preferring programmers in which the operators have an ownership stake, it may do that. But it may not, in the course of

is needed: there must be a showing that financial hardship will befall the particular station seeking carriage rights.[164]

B. Compelled Carriage of WRNN on Long Island Cannot Withstand a Fifth Amendment Challenge.

In its order, the Commission rejected Cablevision's "per se" takings claim on the theory that must-carry "effectuates no permanent physical occupation of a cable operator's property, such as installation of the physical equipment at issue in *Loretto v. Teleprompter Manhattan CATV Corp.*"[165] Rather, the Commission said, "a programming stream is transmitted in bits of data over cable bandwidth through electrons or photons at the speed of light while the cable operator retains com-

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advancing these interests, restrict cable operators and programmers in circumstances where neither of these interests is threatened.").

[164] As explained in the text, compelled carriage of WRNN on Long Island violates Cablevision's First Amendment rights regardless of whether, if a facial challenge were brought today, the Supreme Court would reach the same conclusion as it did in the *Turner* litigation. Given the dramatic changes in circumstances that have occurred in the wake of the *Turner* litigation, however, it is not plausible that the Supreme Court would reach the same conclusion again. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist").

[165] *2007 Order* ¶ 8 (footnotes omitted).

plete control over its physical property (*e.g.*, headend equipment)."[166]

But compelled carriage of WRNN involves the electronic equivalent of a beach-front lot: a 6 MHz channel on an analog cable tier. There is no reason to treat valuable electronic property differently than other property.[167] If the order under review stands, WRNN will be entitled to occupy Cablevision's Channel 48 entirely, denying Cablevision any and all rights to the channel's possession and use. When WRNN occupies Channel 48, a taking occurs, and compensation will fall due.

C. Constitutional Concerns Can and Must Be Avoided.

Although compelled carriage of WRNN on Long Island violates the Constitution, this Court need not so hold. It is well established that any "statute must be construed, if fairly possible, so as to avoid

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[166] *Id.* (footnotes omitted).

[167] *See Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1058 (8th Cir. 1978) ("a requirement that facilities be built and dedicated without compensation . . . would be a deprivation forbidden by the Fifth Amendment"), *aff'd*, 440 U.S. 689 (1979); *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting) ("The creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where the Court struck down a statute entitling cable companies to place equipment in an owner's building so that tenants could receive cable television."), *vacated on other grounds*, 512 U.S. 622 (1994); *see also United States v. Morris*, 928 F.2d 504, 511 (2d Cir. 1991) (characterizing computer "hacking" as a form of trespass).

not only the conclusion that it is unconstitutional but also grave doubts upon that score."[168] It is further well established that, where an agency's reading would generate significant constitutional doubt, that reading is not entitled to *Chevron* deference.[169] Thus, the Court can and should avoid constitutional questions: it should hold that, by interpreting the statute to permit it to compel carriage of WRNN on Long Island, the FCC misread the statute, for the reasons set forth above in Parts I and II.

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[168] *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (internal quotation marks omitted); *see also United States v. Gonzalez*, 420 F.3d 111, 124 (2d Cir. 2005).

[169] *See, e.g., Clearing House Assoc. v. Cuomo*, 510 F.3d 105, 113 (2d Cir. 2007) ("'[W]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.' That broader principle is rooted in the doctrine of constitutional avoidance, which the Supreme Court has recognized may, in some instances, trump the deference typically afforded to an agency's interpretation of the statute it administers."); *Blake v. Carbone*, 489 F.3d 88, 100 (2d Cir. 2007) ("Courts interpret statutes to avoid constitutional infirmities . . . . We therefore reject the government's request for deference.").

APPENDIX C

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 07-5553-ag

CABLEVISION SYSTEMS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

REPLY BRIEF (Final Version)

* * *

March 3, 2008

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III. THE FCC ERRED BY COMPELLING CARRIAGE IN VIOLATION OF CABLEVISION'S CONSTITUTIONAL RIGHTS.

In our opening brief, we showed that the order under review raised significant constitutional doubts, which must be avoided by reading the statute as suggested above. The FCC argues (at 55 n.20) that there are no constitutional doubts because each of Cablevision's constitutional arguments is "insubstantial." As shown below, that is plainly not the case.

A. In our opening brief, we showed (at 52) that the order under review triggers strict First Amend-

ment scrutiny because it requires carriage of WRNN on the basis of WRNN's Long Island-targeted content. In response, the FCC argues (at 47) that we failed to utter the words "strict scrutiny" before the FCC, and that the argument therefore is not properly preserved. But, before the FCC, Cablevision presented the claim that compelled carriage violates the First Amendment, and strict scrutiny is an intrinsic component of that properly preserved claim.[21]

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[21] *See, e.g., Gill v. INS*, 420 F.3d 82, 86 (2d Cir. 2005) (although "a petitioner must have raised an issue below to present it on appeal," the Court has "never held that a petitioner is limited to the exact contours of his argument below"); *id.* at 86-87 (petitioners are free to raise "specific, subsidiary legal arguments, or arguments by extension, that were not made below. . . . particularly one that is purely legal and falls outside the [agency's] traditional area of expertise"); *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d 1004, 1007-08 (D.C. Cir. 1996) ("appellate counsel will often present the same basic argument in a more polished and imaginative form than the Commission saw, but that, unfortunate as it may be for the Commission (and fortunate for us) is not the same thing as presenting a new argument on appeal."); *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. . . . Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment."); *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) ("Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims.

On the merits, the FCC responds (at 47) by saying that strict scrutiny is triggered only if "the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." But it is settled that strict scrutiny is triggered even when the government merely regulates the subject matter that may be discussed, regardless of viewpoint.[22] The FCC also says (at 48) that "WRNN's programming was only one of a number of factors upon which the Commission relied in ordering carriage." But it is settled that, when government acts on a mixed motive, strict scrutiny is triggered so long as part of its motivation relates to content.[23]

They are, rather, separate arguments in support of a single claim — that the ordinance effects an unconstitutional taking.").

[22] *See, e.g., Hill v. Colorado*, 530 U.S. 703, 723 (2000) ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation.").

[23] *See, e.g., Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005) (even though municipality claimed that it "ended [a] protest only because it created a safety hazard, not because the officers disagreed with the message," if the evidence shows that "the restriction of [plaintiff's] speech was content-based, the city must prove that prohibiting [plaintiff] from protesting on pedestrian walkways above the [freeway] is narrowly tailored and necessary to serve a compelling state interest"); *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1250, 1252 (11th Cir. 2004) (where ordinance required permit for demonstrations in "expression of support for, or protest of, any person, issue, political or other cause or action," it did not matter that ordinance was also justified by "goals [of] maintaining public safety, avoiding traffic congestion, keeping the

In our opening brief, we also showed (at 53-54) that the *Turner* Court upheld only a statute that had been justified as restoring broadcast stations to the audience that they would have without cable. That theory can justify compelled carriage only insofar as a cable system's subscribers composed the station's traditional audience. It cannot justify carriage of a station that has expanded its over-the-air signal in pursuit of valuable cable-carriage rights. When broadcasters venture outside of their traditional market and fail to obtain carriage, they have not been injured by cable operators — they have injured themselves.

The FCC responds (at 48-49) by saying that this argument was not preserved. In fact, Cablevision made this precise argument before the FCC.[24] The FCC seeks to hang Cablevision on an assertion in our opening brief (at 54) that, if the government in *Turner* had defended must-carry without any link to cable's ability to siphon away a station's traditional audience, must-carry would have triggered strict scrutiny. But the FCC thereby misapprehends our argument — it is simply that compelled carriage of WRNN on Long Island cannot be justified under the

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peace, and providing advance notice to law enforcement officials of public events").

[24] *See, e.g.*, Opp. at 53 (A-324) ("Must-carry was implemented to help restore broadcast stations in a cable-dominated world to the position they were in before cable became the 'dominant nationwide video medium.' . . . In other words, must-carry was intended to '*preserve* the *existing structure* of the Nation's broadcast television medium.") (internal quotation marks omitted); Opp. at 59 (A-330) (to similar effect); Opp. at 60 (A-331) (same).

rationale that the Supreme Court embraced in *Turner*. We added the "strict scrutiny" point only to explain *why* the government in *Turner* was compelled to rely on a justification limited in this way.

On the merits, the FCC argues (at 49) that "the statutory presumption in favor of DMA-wide carriage, combined with the station's strong signal coverage, the addition of local programming, and competitive carriage, means that WRNN's 'natural market' now extends to Cablevision's Long Island communities." By that statement, the FCC apparently means to suggest that the *Turner* rationale works just as well for a station in its traditional market as it does in a distant community that it targets with a signal and programming solely in search of must-carry rights. But, as shown above, it is unlikely that WRNN would have targeted Long Island if it were not for cable and must-carry. Thus, in a world without cable, WRNN would not be available off-air, and Long Island would not be included in WRNN's market.

In our opening brief, we also pointed (at 54-55) to the part of the *Turner* rationale positing that broadcast signals should be preserved for over-the-air viewers. Because WRNN has no over-the-air viewers, we argued, preserving the availability of WRNN for over-the-air viewers is not a sufficiently weighty interest to justify the curtailment of Cablevision's speech. In response, the FCC argues (at 49) that the *Turner* rationale does "not depend on a particular station's day-to-day audience share." But it seems self-evident that, if WRNN has zero over-the-air viewers, any governmental interest in benefiting those non-existing viewers could not qualify as "im-

portant." Would 1000 over-the-air viewers suffice? One hundred? Ten? One? Surely, there comes a point where the number is so small as to be the analytical equivalent of zero. Wherever the precise line may be drawn, it has been crossed here.

The FCC takes issue (at 50) with our premise, however, arguing that, as the February 17, 2009, digital transition approaches, more and more households will put themselves in a position to receive a digital signal off-air. Even assuming that prediction to be accurate, when WRNN relinquished its analog signal, it represented in an FCC filing that "the impact on the public will be imperceptible since, according to Nielsen Media Research, there was no reportable over-the-air viewing for the station . . . ."[25] In other words, even before the digital transition, WRNN itself insisted that its over-the-air viewership was either non-existent or *de minimis*. We do not understand the FCC to suggest that the digital transition would cause WRNN's over-the-air audience to grow.

In our opening brief, we demonstrated (at 55-58) that the *Turner* rationale vitally depended on the premise that cable operators are not subject to competition. We further showed that, since 1992, Cablevision has become subject to vibrant competition. The FCC casts doubt on the vibrancy of the video competition, pointing (at 51) to an FCC report indicating that, despite DBS competition, cable prices have increased. But rising prices do not signify

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[25] *See WRNN-TV Assocs.*, 19 FCC Rcd 12343, 12344 (MB 2004).

market power — they signify increased costs.[26] Cable rates have increased because the rates that programmers charge Cablevision for programming have exploded.[27]

The FCC also argues (at 51) that, "whatever the competitive promise of Verizon's entry into Cablevision's market, Verizon has only recently launched its FiOS video service on Long Island and then only in selected communities." The FCC does not explain why it matters that Verizon launched only recently, and one would think that recent entrants are particularly fierce competitors. Moreover, the FCC ignores that Verizon has announced that it will provide FiOS service in the remaining communities soon.[28] As summarized in Cablevision's recently filed Form 10-K, then, Cablevision "face[s] intense competition from . . . Verizon."[29]

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[26] *See, e.g.*, Steven S. Wildman, *Assessing Quality-Adjusted Changes in the Real Price of Basic Cable Service*, at 3 (Sept. 10, 2003), *available at* http://www.ncta.com/DocumentBinary.aspx?id=266; Statement of Dr. Debra J. Aron ¶ 16, *available at* http://www.ncta.com/DocumentBinary.aspx?id=317.

[27] *See, e.g.*, United States General Accounting Office, *Subscriber Rates and Competition in the Cable Television Industry*, GAO-04-262T, at 9 (Mar. 25, 2004), *available at* http://www.gao.gov/new.items/d04262t.pdf.

[28] *See* Verizon Communications Inc., News Release, *Verizon FiOS TV Customers Have a Powerful New Way to Find and Enjoy Home Entertainment*, July 17, 2007, *available at* http://newscenter.verizon.com/press-releases/verizon/2007/Verizon-FiOS-tv-customers.html ("The company expects 15 million households to be video-ready by 2010.").

[29] Cablevision Systems Corp., Form 10-K, Annual Report for the Fiscal Year Ended Dec. 31, 2007, at 12 (Feb. 28, 2008),

Finally, our opening brief showed (at 59-60) that the *Turner* rationale posited that, without carriage, broadcast stations would "either deteriorate to a substantial degree or fail altogether," and that there is no evidence that lack of carriage on Long Island will have that impact on WRNN. In response, the FCC argues (at 52-53) that the *Turner* rationale need not hold true in every case, so long as it holds true for broadcasters in the aggregate.

It is true that the Supreme Court in *Turner* asked only whether, without must-carry, "*significant numbers of broadcast stations* will be refused carriage on cable systems, and those broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether."[30] But the *Turner* case involved a facial challenge. Thus, the FCC there needed to show only that must-carry could be constitutionally applied in some cases.

The instant case, by contrast, presents an as-applied challenge. Cablevision has a right to a determination whether its First Amendment rights are being infringed when it is compelled to carry a particular station (WRNN). That means that the FCC must show (at a minimum) that compelled carriage narrowly promotes an important governmental interest. Whether it can do so necessarily depends on whether it can show that, without carriage, deterioration or failure will befall the particular station at issue (WRNN). It cannot be relevant

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available at http://ccbn.10kwizard.com/xml/download.php?repo=tenk&ipage=5500017&format=PDF.

[30] *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 191-92 (1997) (emphasis added, internal quotation marks omitted).

whether, without carriage, deterioration or failure will befall some other station.

The FCC suggests, however, that there is an iron law of broadcast economics that, without carriage, a station will always "deteriorate to a substantial degree or fail altogether." In a case like this, involving a station seeking carriage in a community outside of its natural market (not a station excluded from communities within its traditional market), that runs counter to common sense. WRNN has been operational for more than 20 years and it has thrived without carriage on Long Island. Moreover, one can easily imagine a spoke station that is carried in its own spoke, that broadcasts just enough local programming to avoid license revocation, that broadcasts home-shopping programming the rest of the time, and that, as a result, reaps an extremely high return on investment. If such a station is denied carriage in another spoke, it will not "deteriorate" to any degree — it will only be hampered in reaping a return on investment that is even higher.

Whether the scenario in the prior paragraph accurately describes WRNN cannot be ascertained: WRNN is a closely held company that does not publish financial results. As we explained in our opening brief (at 59), however, there is every reason to believe that WRNN thrives. Neither the FCC nor WRNN have shown otherwise, and it was their burden to do so.[31] Accordingly, the record in this case

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[31] *See, e.g., United States v. Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992) ("the government bears the burden"); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1457 (D.C. Cir. 1985) (describing "the burden the government must affirmatively bear to prove

allows only one conclusion: lack of carriage on Long Island will in no way affect WRNN's programming, just its owners' profits.

B. In our opening brief (at 60-61), we showed that must-carry requires cable operators to pump broadcasters' signal through their cable pipes. If a government agency required an oil pipeline to carry oil for unaffiliated companies, a physical occupation would unquestionably occur. The result should be no different when the occupation is not of a physical pipeline but of an electronic one. Cablevision transmits video signals in 6 MHz channels over its cable systems. The order under review completely appropriates the entirety of one such channel. The order denies Cablevision any compensation for the loss of this property.[32] Such an appropriation without compensation is an impermissible taking, even if the property in question is "electronic" in nature.

In response, the FCC relies on a single decision of the Court of Federal Claims, an Article I court whose decisions are appealable to the Court of Ap-

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the substantiality of the interest served by the rules"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977) (per curiam) (FCC must compile "a record that convincingly shows a problem to exist"); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.") (internal quotation marks and citations omitted).

[32] *See* 47 U.S.C. § 534(b)(10).

peals for the Federal Circuit. In that decision, *Qwest Corp. v. United States*, 48 Fed. Cl. 672 (2001), the Court of Federal Claims rejected a claim by an incumbent telephone company that a taking had occurred when it was required to allow competitive telephone companies to transmit their communications through its wires. The court's holding on the point at issue here, however, is contained in just two sentences (at 694) that are devoid of any reasoning:

> While . . . the government-mandated co-location of one party's equipment on another party's premises constitutes a physical taking of the occupied space — because physical objects owned by one party have invaded and occupied physical space owned by the other — it is another question entirely whether the telecommunications traffic (*i.e.*, electrical impulses) of a competing carrier on the host carrier's equipment pursuant to a mandatory lease can be considered a "physical taking" of that equipment. There is no precedent for finding that the compulsory lease of [telephone wires] constitutes a "physical taking" of the subject equipment, and the court is not persuaded by plaintiff's "electron theory" that the telecommunications traffic [the competitor] generates on the [wires] it leases from Qwest constitutes a physical taking of [those wires].

In sum, there is no precedent from any court of appeals that supports the FCC's theory, and the single Court of Federal Claims decision on which the FCC relies is unreasoned. By endorsing the FCC's theory (that takings cannot be effected by an electronic occupation), then, this Court would break new ground. There simply is no reason why an elec-

tronic occupation should be treated differently from any other physical occupation.[33]

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[33] *See Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting) ("the insertion of local stations' programs into a cable operator's line up presumably is not a metaphysical act"), *vacated on other grounds*, 512 U.S. 622 (1994).

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No. 09-901

IN THE

Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* C-SPAN IN SUPPORT OF PETITIONER

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National Cable Satellite Corporation d/b/a C-SPAN ("C-SPAN") submits this *amicus curiae* brief in support of the Petition for a Writ of Certiorari.[1]

INTEREST OF *AMICUS CURIAE*

C-SPAN is a private, non-profit company created in 1979 by the cable television industry as a public service. C-SPAN receives no government funding; operations are funded by fees paid by cable and satellite affiliates who carry C-SPAN programming. C-SPAN is a non-profit educational organization with a board of directors comprised of executives from large and small cable television operating companies. Today, its round-the clock programming is available to 99.1 million television households.

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[1]Pursuant to Supreme Court Rule 37, counsel for *amicus curiae* state that they and *amicus* authored this brief and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission. Mr. Sokler, counsel for *amicus curiae* C-SPAN, has long served as counsel for C-SPAN, including in *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994), *Turner Broadcasting v. FCC*, 520 U.S. 180 (1997), and *C-SPAN v. FCC*, 545 F.3d 1051 (D.C. Cir. 2008), all involving the must-carry statute at issue here. Mr. Sokler is a member of the law firm Mintz Levin; other members of Mintz Levin are among the counsel for Petitioner. Neither Mr. Sokler nor any other of *amicus's* counsel or *amicus* had any role in the drafting of the Petition for a Writ of Certiorari for Petitioner, and counsel for Petitioner had no role in the drafting of this *amicus* brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the clerk.

C-SPAN2 began covering live United States Senate debates in 1986 and is now available to 87.1 million television households. In addition, C-SPAN2 offers long-form coverage of current events and issues, and during the weekends, telecasts *Book TV*—48 hours of non-fiction book programming. Launched in January, 2000 as a digital-only service, C-SPAN3 offers additional public affairs programming. Weekdays, C-SPAN3 offers public affairs events from Washington and around the country, including committee hearings, press conferences, and speeches from political leaders, frequently on a live basis. On weekends, C-SPAN3 spotlights American history. It is now available to 31.1 million digital households.

C-SPAN has been a consistent and active opponent of the must-carry statute that infringes its First Amendment rights as a speaker. C-SPAN was one of the parties that challenged the must-carry statute immediately after it was enacted in *Turner Broadcasting, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*) and *Turner Broadcasting, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*). C-SPAN has also challenged FCC regulations that interpreted and expanded the reach of the must-carry statute. *C-SPAN v. FCC*, 545 F.3d 1051 (D.C. Cir. 2008).

SUMMARY OF ARGUMENT

Facts are not immutable. They often evolve and change over time. Such is the case in what the *Turner II* plurality recognized was "the complex and fast-changing field of television." *Turner II*, 520 U.S. at 224. This Court has long recognized that a change in the facts can alter the analysis of whether a statute is constitutional: "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . that those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938). C-SPAN agrees with Petitioner that the time has come for this Court to reassess whether the must-carry statute can still be justified despite the First Amendment abridgements that it inflicts.

C-SPAN has always asserted that the establishment of a hierarchy of speakers, whereby broadcasters are guaranteed cable carriage under the must-carry regime while cable programmers like C-SPAN must compete for whatever carriage remains, cannot be justified under the First Amendment. C-SPAN believes, as courts have already begun to recognize, that the factual underpinnings supporting must-carry have evaporated. As a consequence, the gamesmanship that the must-carry regime has created, in which a home shopping station can manipulate the must-carry rules to reach a whole new cable audience far beyond its broadcast market and thereby bump a cable programmer like C-SPAN, should not be permitted to continue.

ARGUMENT

"There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and provisions of the First Amendment." *Turner I*, 512 U.S. at 636. "By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining. *Id.* at 636-37 (emphasis added). *See also Turner II*, 520 U.S. at 226 (Breyer, J., concurring) (must-carry "extracts a very serious First Amendment price . . . [which] amounts to a 'suppression of speech'") (citations omitted); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1461 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (finding that must-carry rules violate First Amendment rights of programmers due in part to "the fact that [a broadcaster] is guaranteed a channel even if carriage effectively bumps a cable programmer").

C-SPAN has always asserted that the establishment of a hierarchy of speakers, whereby broadcasters are guaranteed cable carriage under the must-carry regime while cable programmers like C-SPAN must compete for whatever carriage remains, cannot be justified under the First Amendment. This Court in its *Turner* decisions reached the opposite conclusion. In doing so, the plurality in *Turner II* made clear that its task was to

determine whether "the legislative conclusion [enacting must-carry] was reasonable and supported by substantial evidence in the record before Congress." *Turner II*, 520 U.S. at 211; *see also Turner I*, 512 U.S. at 665-66. This deference to Congress permitted the plurality to justify the First Amendment abridgement that must-carry inflicts upon programmers "regardless of whether the evidence is in conflict." *Id.*

Facts, however, are not immutable. They often evolve and change over time. Such is the case in what the *Turner II* plurality recognized was "the complex and fast-changing field of television." *Turner II*, 520 U.S. at 224. This Court has long recognized that a change in the facts can alter the analysis of whether a statute is constitutional: "the constitutionality of a statute predicated upon the existence of a particular state of acts may be challenged by showing . . . that those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938). C-SPAN agrees with Petitioner that the time has come for this Court to reassess whether the must-carry statute can still be justified despite the First Amendment abridgements that it inflicts.

Courts are already recognizing that "many significant changes . . . have occurred [in the marketplace] since 1992," which is when Congress made the findings that underlie the must-carry statute. *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (noting "evidence of ever-increasing competition among video providers."). In setting aside regulations implementing another part of the 1992 Cable Act (which included the must-carry regime), the D.C. Circuit in *Comcast* also recognized

that "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992," *id.*, and that "satellite television companies, which were bit players in the early 90s, now serve one-third of all subscribers. *Id.* at 3.

C-SPAN contended in the *Turner* litigation that simple A/B switches were a less-infringing alternative that preserved subscriber access to over-the-air broadcast stations. In 1992, Congress concluded that the use of A/B switches was "not an enduring or feasible method of distribution and . . . not in the public interest." *Turner II*, 520 U.S. at 219. In *Turner II*, the plurality concluded that "Congress' decision that use of A/B switches was not a real alternative to must-carry was a reasonable one based on substantial evidence of technical shortcomings and lack of consumer acceptance." 520 U.S. at 221. But the world has changed since then. Over-the-air television migrated from analog to digital in June 2009. *See* FCC News Release, "Full-Power TV Broadcasters Go All-Digital," June 13, 2009. In the digital world, A/B switches are "built into television receivers and can be easily controlled from a TV remote control device." *Carriage of the Transmissions of Digital Television Broadcast Stations*, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15102 ¶ 16 (1998).

The preference given to broadcasters in the hierarchy of speakers created by the must-carry statute is even more pronounced today. In 1992, cable operators basically offered only one or two tiers of so-called "analog" service. Now, cable operators offer consumers additional "digital" tiers. Because the analog tiers have been filled, most newer

services, for example C-SPAN 3, obtain carriage, when they do, on digital tiers that have fewer subscribers. Under the must-carry statute, however, broadcasters are entitled to carriage on the most widely distributed analog tiers. *See* 47 U.S.C.§ 534(b)(7).

The First Amendment harm inflicted upon C-SPAN (and other similarly situated programmers) by the statute's operation is far from theoretical. Indeed, between June 1993 and the end of the 1990s, 12 million cable homes lost all or some access to C-SPAN's public service programming as cable operators were forced to make room on their systems to carry hundreds of additional broadcast stations. In the instant case, the compelled carriage of WRNN sets up C-SPAN and other non-broadcast programmers to face the same fate again: risk being moved off of or dropped entirely from carriage on the most widely distributed tier of cable service.

Cablevision was in no way a "bottleneck" preventing WRNN from reaching its intended audience in the Hudson Valley area of Kingston, New York. Cablevision does not operate at all in Kingston, New York; to the contrary, Cablevision's Long Island cable systems lie as much as 195 miles away from Kingston. *See* Petition at 10 and Pet. App. 66a, n.11. But owing to the absurd incentives of the must-carry statute, and in an action that furthers none of the objectives that Congress identified as important when enacting must-carry in 1992, WRNN moved its antenna 50 miles to the south in order to extend the reach of its over-the-air signal. *See* Pet. App. 9a, 38a, ¶ 11. If the statute is allowed to operate, WRNN will have extended its home shopping programming to a new cable

audience that never would have seen its over-the-air signal, and Cablevision will be deprived of its editorial rights. C-SPAN will either lose its audience (if it is dropped) or have its audience reduced (if it is moved to a less widely distributed tier). The First Amendment should not be tossed aside to permit this type of gamesmanship.

Programmers like C-SPAN only want the opportunity to compete in the marketplace of ideas. The First Amendment, absent circumstances no longer present here, should guarantee them the right to compete for that opportunity.

CONCLUSION

Amicus curiae C-SPAN respectfully asks that the Court grant the Petition.

Respectfully submitted,

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CABLEVISION SYSTEMS CORPORATION,
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FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* DISCOVERY COMMUNICATIONS, LLC IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Discovery Communications, LLC ("Discovery") is a leading global media and entertainment company that provides original and purchased cable and satellite television programming across multiple platforms in the United States and over 170 other countries. Discovery's worldwide networks include the Discovery Channel, TLC, Animal Planet, Science Channel, Planet Green, Discovery Health, and HD Theater. Discovery also develops and sells consumer and educational products and services in the United States and around the world, and operates a diversified portfolio of website properties and other digital services.

Discovery's U.S. cable networks have a well-earned reputation for unparalleled production values, spectacular cinematography, and compelling stories. These networks invite viewers to explore their world by providing engaging programming that spans a number of nonfiction genres, including science, exploration, natural history, environmental sustainability, technology, anthropology, engineering, health and wellness, and current events. The Discovery Channel, Discovery's flagship network, is home to the critically acclaimed miniseries *Planet Earth* and *When We Left Earth: The NASA Missions*, as well as several popular ongoing series, including *Deadliest Catch*, *MythBusters*, and *Man vs. Wild*.

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[1] Pursuant to this Court's Rule 37, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to the filing of this brief. Letters of consent have been filed with the clerk.

Discovery's award-winning programming competes with broadcast and cable networks for limited shelf space on cable systems. Like all programming providers, Discovery seeks carriage arrangements that enable it to reach the widest possible audience. Discovery benefits most when it secures placement on an analog cable tier (often known as "basic" or "expanded basic") that all subscribers can access, including those who rely on an analog television and directly connect the cable wire without using a set-top box. Most Discovery networks are carried on digital tiers with lower penetration, however, in large part because broadcast stations not only enjoy a government-guaranteed right of carriage, but are entitled to carriage on the basic programming tier, *see* 47 U.S.C. § 543(b)(7), and therefore crowd out all but a handful of cable networks. In short, because cable carriage is a zero-sum game, broadcast stations like WRNN-TV that invoke their must-carry rights under 47 U.S.C. § 534 necessarily disadvantage cable programmers, such as Discovery, which must negotiate for carriage without any government backing. That naked preference violates the First Amendment rights of cable programmers and, by displacing more popular cable programming that viewers would prefer to see, the rights of the viewing public as well. Discovery therefore has a strong interest in removing the substantial burden on its speech imposed by the government's preference for broadcasters under the must-carry regime.

SUMMARY OF ARGUMENT

A core tenet in First Amendment jurisprudence is that the Government cannot take the right to speak

from some speakers and give it to others. Yet that is precisely the effect of the government's must-carry regime, which forces capacity-constrained cable systems to carry even marginal and unpopular stations that happen to have a broadcast license, replacing important and highly regarded cable programming that viewers actually would prefer to see. Rather than competing on the merits of their content, broadcasters enjoy the benefits of a statutory preference for their speech over the speech of cable programmers—the kind of preference this Court has repeatedly condemned. *See Citizens United v. FEC*, No. 08-205, slip op. at 24 (U.S. Jan. 21, 2010) (holding that a governmental preference for one speaker over another "deprive[s] the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another."); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .").

In the 1990s, under a fundamentally different set of market conditions, this Court narrowly upheld the must-carry statute against a First Amendment challenge by pointing to a content-neutral governmental interest in preserving the "viability of broadcast television." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994) ("*Turner I*"). The Court accepted the premise that cable operators had unchecked and growing "monopoly power" in local

markets around the country, and would have a strong incentive not to carry local broadcast stations—even popular ones that customers would otherwise demand—because cable operators compete with the broadcast stations for local advertising dollars. *Id.*; *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 197 (1997) ("*Turner II*") (noting that "cable operators had considerable and growing market power over local video programming markets"). The Court deferred to Congress's prediction in 1992 that, absent must-carry, cable operators' incentive to freeze out broadcasters would cause many local stations to go dark. *Turner II*, 520 U.S. at 191. The Court also predicted that the "burden of must-carry" would be "modest" for cable programmers that compete with broadcasters for carriage and tier-placement, because of what seemed at the time to be a boundless potential for expansion in cable channel capacity. *Id.* at 214.

In the almost twenty years of dramatic change since 1992, new developments in technology and in the media content and delivery markets have made the must-carry regime an outmoded relic. Today's vastly different technological and market conditions change the constitutional analysis in at least two fundamental ways.

First, must-carry now burdens substantially more speech than this Court believed it would, particularly the speech of cable programmers like Discovery. The growth in channel capacity that this Court predicted has not solved the problem—but instead has been outstripped by an unanticipated and remarkable explosion of programming content. Slots on cable systems have in fact become more scarce than ever. Despite this scarcity, the must-carry statute mandates

that cable systems make room on their most widely penetrated tiers for broadcasters insisting on mandatory carriage. The FCC's must-carry rules also guarantee broadcasters placement on the lowest-numbered channels, which are easier for subscribers to find and remember. 47 C.F.R. § 76.57. Cable operators have no choice but to bump Discovery and other cable programmers onto less popular tiers with less desirable channel placement. And sometimes a cable operator's must-carry obligations preclude it from carrying a cable network altogether, even if viewers would choose it over one or more must-carry stations. By locking in this preference for broadcasters' speech, must-carry makes Discovery and other cable programmers second-class speakers, undercuts the government's interest in promoting a diversity of voices, and displaces the actual viewing preferences of cable subscribers to an extent that this Court could not have predicted.

Second, technological and marketplace developments have both undermined the importance of protecting broadcast television and ameliorated the threat that Congress saw. Modern consumers can access information and media content through a wide variety of channels, some of which barely existed in 1992—such as the Internet and television signals delivered by satellite and over the phone lines. The factual premises underlying must-carry—that cable operators enjoy local monopoly power in the distribution of content and have strong anticompetitive incentives to refuse carriage of broadcast signals in order to maximize advertising revenue—describe a marketplace that no longer exists. Cable operators now face vigorous competition from satellite companies, telephone companies, the Internet, and a

host of other emerging technologies for the distribution of video programming in local markets. As the D.C. Circuit recently concluded, "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

Discovery therefore urges this Court to grant certiorari to determine whether the statute's clear preference for broadcasters' speech over cable programmers' speech can withstand First Amendment scrutiny under current marketplace conditions.

ARGUMENT

As Cablevision's Petition demonstrates, the must-carry statute is unconstitutional as applied to the facts of this case, particularly in light of the major developments in the video programming marketplace since 1992. The statute's application not only fails under strict scrutiny, Pet. 29-32, but also can no longer withstand the intermediate scrutiny applied in *Turner I* and *II*. Under intermediate scrutiny, must-carry's application in this case can be sustained only "'if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'" *Turner II*, 520 U.S. at 189 (citation omitted); *see also Turner I*, 512 U.S. at 662. In today's marketplace, the burden on cable programmers competing for limited shelf space on cable systems is substantial. And the asserted governmental interests in protecting broadcast television can no longer justify that burden.

I. MUST-CARRY NOW BURDENS SUBSTANTIALLY MORE SPEECH THAN NECESSARY.

This Court has long recognized that the must-carry regime burdens the speech of cable programmers. In *Turner I*, the Court acknowledged that "the must-carry provisions impose . . . special burdens upon cable programmers," triggering "some measure of heightened First Amendment scrutiny." 512 U.S. at 641. Those burdens include "reducing the number of channels for which [cable programmers] can compete." *Id.* at 645. The Court in *Turner II* agreed, observing that "[t]he must-carry provisions have the potential to interfere with protected speech" by "'render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining.'" 520 U.S. at 214 (quoting *Turner I*, 512 U.S. at 637).

The record developed on remand after *Turner I* suggested to this Court in 1997 that cable operators could generally "satisfy their must-carry obligations" by "using previously unused channel capacity" and that "the actual effects" of must-carry therefore would be "modest." *Turner II*, 520 U.S. at 214. This Court predicted that must-carry would "not displace cable programmers," *id.* at 205, and that any burdens on cable programmers "will soon diminish as cable channel capacity increases," *id.* at 214.

The Court in *Turner II* could not have foreseen the vibrant and diverse programming marketplace that has since developed. Over the past decade, the surge in the number of cable networks in the marketplace has far outpaced the growth in cable channel capacity. The Federal Communications Commission ("FCC") has

estimated that roughly 565 national cable programming networks and 101 regional non-broadcast cable networks now compete with broadcasters for an average of 226 channel slots. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 ¶¶ 20-21, 44 (2009) (hereinafter "Thirteenth Annual FCC Report"). Cable operators typically carry fewer than a third of those channels on their highest-penetration "analog" tiers, to which every cable subscriber has access. *Id.* ¶ 44. The remaining two-thirds of the slots are available only on digital tiers, which cable subscribers must actively request and purchase in addition to their basic service. *Id.* Viewers also must lease or purchase a set-top box to access digital tiers. Competition among programmers thus is especially intense for placement on the low-capacity, high-penetration analog tiers. *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order, 23 FCC Rcd 2134 ¶ 58 (2008) (noting that new cable networks are typically placed on digital tiers and recognizing the "significantly lower penetration rate" of such tiers), *vacated on other grounds sub nom. Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

Must-carry entitles broadcasters but not cable programmers to guaranteed placement on cable's highest-penetration tiers, regardless of "what speech and speakers" the public believes "worthy of consideration." *Citizens United*, slip op. at 24. This statutory guarantee has a direct, adverse impact on the speech of cable programmers seeking carriage on today's capacity-constrained cable systems. Cable systems cannot "fulfill their must-carry obligations

using spare channels," as the Court assumed they could in 1997. *Turner II*, 520 U.S. at 205. Instead, they must now make room for must-carry broadcasters by displacing other programmers that have no such right. Thirteenth Annual FCC Report ¶¶ 20-21, 44. Must-carry forces cable systems to bump cable networks to less popular tiers and sometimes precludes a cable programmer from carriage altogether.[2] The statute thus ensures that, on the whole, cable programmers are far less likely to achieve the high level of distribution via cable that broadcasters automatically enjoy. This artificial limit on a cable programmer's reach imposes a substantial burden on its speech. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1461 (D.C. Cir. 1985) (recognizing "substantial First Amendment costs" in "guarantee[ing] a channel even if carriage effectively bumps a cable programmer"), *cert. denied*, 476 U.S. 1169 (1986).

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[2] *See, e.g., Carriage of the Transmissions of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission's Rules*, Opposition of Discovery Communications, Inc. to Petitions for Reconsideration, CS Docket No. 98-120, at 9-10 (filed May 26, 2005) (describing Discovery's inability to gain carriage of Animal Planet in the Manhattan market on the expanded basic level of service, despite its proven value, due to the large number of broadcasters on the system occupying extensive channel capacity).

II. CURRENT MARKETPLACE REALITIES SHOW THAT MUST-CARRY DOES NOT DIRECTLY AND MATERIALLY ADVANCE IMPORTANT GOVERNMENT INTERESTS.

Even apart from the magnitude of the burden on cable programmers' speech, the profound changes in the marketplace since 1992 make *any* such burden unwarranted. There is no longer any sound basis for governmental preferences for broadcast stations' speech, and no legitimate danger that a cable bottleneck threatens the "the viability of broadcast television." *Turner I*, 512 U.S. at 661.

First, the *Turner I* Court found that there was an important governmental interest in promoting broadcast television over other media, which is not surprising given the central role broadcast television once occupied in the lives of Americans. But "the widespread dissemination of information from a multiplicity of sources" no longer genuinely depends on preserving several independent broadcast television stations in every local market nationwide. *Turner I*, 512 U.S. at 662. Consumers now have access to more information from more outlets than ever before, including a wide array of subscription video providers and myriad sources of news, information, and entertainment over those platforms and on the Internet.

The Internet in particular has largely supplanted (and greatly surpassed) broadcast television's traditional role in stimulating public participation in "the national discourse." *Turner II*, 520 U.S. at 194. *See, e.g.*, Thirteenth Annual FCC Report ¶ 156 & n.535

(reporting that "[m]ajor internet portals . . . offer pre-existing and original video content from traditional video providers," and that "Google Video, for example, allows viewers to search, view, and purchase video content, and allows users to share opinions about video clips"). And broadband Internet access has become available nationwide over the last decade and is now enjoyed by a substantial majority of Americans, *see Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 ¶ 48 (2009) (estimating that 63 percent of Americans have adopted broadband Internet services), while the percentage of broadcast-only households has plummeted from 40 percent at the time of *Turner II* to less than 13 percent today. *See Turner II*, 520 U.S. at 216 (noting that, in 1997, "40 percent of American households [were] without cable"); Thirteenth Annual FCC Report, Appendix B, Table B-1 (reporting that, as of 2007, 87 percent of households subscribed to multichannel video programming distribution services).

The FCC has also acknowledged the emergence of local cable news stations and recently observed that "local news and local community or educational programming is readily replicable by competitive MVPDs." *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, FCC 10-17, MB Docket No. 07-198 ¶ 51 n.200 (rel. Jan. 20, 2010). Moreover, subscription news services like CNN, FOX News, and MSNBC reach millions of viewers without broadcasting over the air and, for many viewers, have replaced broadcast networks as a primary source of news. *See* Lymari Morales, *Cable, Internet News Sources Growing in Popularity*, Gallup, Dec. 15, 2008,

http://www.gallup.com/poll/113314/cable-internet-news-sources-growing-popularity.aspx (noting that "significantly more Americans say they turn to cable news networks daily than say they turn to nightly network news programs"). In light of varied alternatives for disseminating information and promoting the national discourse, the government's "special protections" for broadcasters are an unjustified anachronism.

Second, the development of robust competition among video distributors has eliminated the threat that cable operators will prevent audiences from viewing broadcasters' programming. Even assuming the continuing importance of a governmental interest in protecting broadcasters' speech, therefore, the must-carry statute no longer directly and materially advances that interest. Far from requiring governmental assistance, more and more broadcast stations are now demanding and receiving substantial cash payments in return for their consent to retransmit their signals on cable systems. *See, e.g.*, Lynn Hicks, *Mediacom, Sinclair Reach Agreement; Subscribers Will Pay More*, Des Moines Register, Jan. 8, 2010, at B7 (noting that Sinclair, a broadcast station group, was reported to be seeking "a 50 percent increase in fees" for carriage); Brian Stelter, *Next Up on Cable TV, Higher Bill for Consumers*, N.Y. Times, Jan. 4, 2010, at A1 ("On New Year's Day, the News Corporation, the media empire controlled by Rupert Murdoch, wrangled new payments from Time Warner Cable, including subscriber fees for the Fox Broadcasting network, which is free for viewers with over-the-air antennas."). The "marginal" broadcasters that most concerned the Court in *Turner II* also have far better distribution

options than they did in the 1990s. The FCC recently found that satellite and wireline services now provide significant alternatives to cable, and that "[t]he MVPD marketplace ... continue[s] to grow." Thirteenth Annual FCC Report ¶ 5.

As a result of these new platforms, the purported monopoly power and anticompetitive incentives in the cable market that concerned this Court in *Turner II* have largely evaporated. The Court in *Turner I* found that "the bottleneck monopoly power exercised by cable operators" required special protection for broadcast stations because cable providers had an incentive to freeze out local broadcast stations in order to maximize local advertising revenue. *Turner I*, 512 U.S. at 661. *Turner II* echoed this finding and observed that, in 1992, "cable operators had considerable and growing market power over local video programming markets." *Turner II*, 520 U.S. at 197. This Court believed that expanding monopoly power "would give cable operators increasing ability and incentive to drop local broadcast stations" that "compete with them for audience and advertisers." *Id.* at 197, 200.

More than a decade later, both the FCC and the D.C. Circuit have recognized that cable's monopoly has disappeared, along with any "incentive" or "ability" cable may once have had to harm broadcast television by denying carriage. In its January 2009 report on the market for video programming distribution, the FCC recognized that cable operators face competition in nearly every local market from satellite video providers, wireline providers, and Internet-based providers, among others. Thirteenth Annual FCC Report ¶¶ 5, 17. According to the FCC, satellite

providers DIRECTV and DISH Network have surpassed all cable operators but Comcast to become the second and third largest multichannel video programming distributors. *Id.* ¶ 76. Wireline providers such as Verizon FiOS and AT&T U-verse more than doubled their subscribership in 2008 and are "continu[ing] to expand their service areas." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, 24 FCC Rcd 4401 ¶ 33 (2009). The Department of Justice observed in 2008 that "[t]he most significant development in regard to [multichannel video programming distribution] in the past three years is entry by the principal local telephone companies." U.S. Dep't of Justice, *Voice, Video And Broadband: The Changing Competitive Landscape And Its Impact On Consumers*, at 6 (Nov. 2008), *available at* http://www.usdoj.gov/atr/public/reports/239284.pdf. And the precipitous rise of Internet video distribution, particularly on iTunes, Hulu, and YouTube, led the FCC to determine in 2009 that "established models for the distribution of video programming are being challenged by these technological advancements and consumers' ability to receive video programming via alternative means, not just from traditional linear networks." Thirteenth Annual FCC Report ¶ 153. Such developments led the D.C. Circuit to conclude that the "bottleneck" power that once justified analogous restrictions on cable operators has now disappeared. *Comcast Corp. v. FCC*, 579 F.3d at 8.

Robust competition among programming distributors has rid cable operators of "the power and the incentive to harm broadcast competitors" by

withholding carriage. *Turner I*, 512 U.S. at 633. While a strategy of refusing to carry even popular broadcast stations might have made sense in a monopoly environment, it would be self-defeating for any cable operator today. Cable operators simply face too much competition now, in every market, to risk denying subscribers access to programming that might drive them to a competitor. FCC studies have demonstrated that, in today's marketplace, a cable operator will rapidly lose market share to competing video distributors if it stops carrying one or more local broadcasters. In assessing a carriage dispute in 2000 between Time Warner Cable and a local ABC affiliate in Houston, the FCC found that "[a] number of Time Warner customers ... switched to DirecTV" during "the temporary withdrawal of the ABC broadcast station from Time Warner subscribers in the Houston [market]." *General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corp. Ltd., Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶¶ 207-08 (2004). Competition has therefore tempered "the risk of anticompetitive carriage denials" that concerned this Court in 1997. *Turner II*, 520 U.S. at 207.

Congress's concerns about future horizontal concentration and vertical integration in the cable industry also have proven either incorrect or irrelevant in today's marketplace. The Court in *Turner II* believed that "as a small number of multiple system operators (MSO's) acquired large numbers of cable systems nationwide," the resulting "structure of the cable industry would give cable operators increasing ability and incentive to drop local broadcast stations

from their systems." *Id.* at 197. But those predictions were based on assumptions about an industry "structure" that lacked the vigorous competition among cable operators, satellite providers, and telephone company providers that exists today. The FCC recently concluded that cable "clustering" in today's marketplace actually *promotes* competition by "mak[ing] cable operators more effective competitors to [telephone companies] whose local service areas are usually much larger than a single [cable] franchise area." Thirteenth Annual FCC Report ¶ 180.

The predicted harms of vertical integration in the cable industry likewise have failed to materialize. This Court assumed in 1997 that because "many MSO's owned or had affiliation agreements with cable programmers," those "cable operators would have an incentive to drop local broadcasters and to favor affiliated programmers." *Turner II*, 520 U.S. at 198. But vertical integration has diminished markedly since Congress enacted the must-carry statute. In 1992, 57.4 percent of programming networks were vertically integrated with cable providers; by 2006, that figure had shrunk to 14.9 percent. *See* H.R. Rep. No. 102-628, at 41 (1992); Thirteenth Annual FCC Report ¶ 184. While cable networks and cable systems were growing less integrated, broadcast interests have gone in the other direction. The major broadcast networks have all become integrated with major cable networks and use their combined clout to secure favorable carriage deals for station affiliates.[3] Many independent broadcast

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[3] *See* CBS Corp., Form 10-K (filed Feb. 25, 2009), at 2-5 (detailing ownership of CBS assets, the cable network Showtime, and other cable networks); News Corp., Form 10-K (filed Aug. 12,

stations have become part of large "station groups" that pool carriage rights across markets, thus enabling broadcasters to wield considerable economic power in seeking carriage on cable systems.

Even if cable operators were still dominant, today's cable systems would have little incentive to drop a broadcaster in order to "capture broadcasters' advertising revenues," as this Court assumed in 1997. *Turner II*, 520 U.S. at 188. Television advertising revenues, like print advertising revenues, are declining under pressure from emerging technologies. *See* Thirteenth Annual FCC Report ¶ 106. Companies are increasingly shifting their advertising spending away from television and toward popular websites like Google. *See* Eric Pfanner, *Rate of Decline in Global Ad Spending Slows, Report Shows*, N.Y. Times, Sept. 30, 2009, http://www.nytimes.com/2009/10/01/technology/internet/01ads.html (reporting that "online ad spending overtook television in the first half" of 2009). The development of digital video recorders ("DVRs"), which allow consumers to search for and record programming, has also led to "significant reductions in advertising revenues," since users "can more easily avoid watching commercial advertisements." Jonathan Levy, Deputy Chief Economist, FCC, *The Evolving Structure and Changing Boundaries of the U.S. Television Market in the Digital Era*, at 3 (June 1, 2006), *available at*

2009), at 8, 10-13 (detailing ownership of FOX assets, Fox News, and other cable networks); Walt Disney Co., Form 10-K (filed Dec. 2, 2009), at 1-3 (detailing ownership of ABC assets, ESPN, and other cable networks); General Electric Co., Form 10-K (filed Feb. 19, 2010), at 8 (detailing ownership of NBC assets, MSNBC, and other cable networks).

http://www.fcc.gov/ownership/materials/newly-released/evolving060106.pdf. The availability of television content over the Internet and on mobile devices like phones (and, soon, tablet computers) only accelerates that trend.

This Court's decision in *Turner II* rested on the assumption, reasonable in 1997, that "advertising revenue would be of increasing importance to cable operators . . . providing a steady, increasing incentive to deny carriage to local broadcasters." *Turner II*, 520 U.S. at 203. The opposite has proven true. Media providers of all kinds (other than Google) are being forced to move away from advertising-based revenue streams and toward subscription models where success depends entirely on giving the customer the content he wants.

On the record before it, the Court in *Turner II* could not have anticipated this sea change in the video programming marketplace, but market conditions today compel a new and inescapable conclusion. Broadcasters no longer need the extraordinary preference embodied in must-carry, and its overwhelming burdens on cable systems and programmers have become wholly unjustifiable. If cable providers ever had the ability or incentive to block or distort actual customer preferences in the programming marketplace, they no longer do. As a result, the must-carry statute undercuts the very public interest goals it was intended to promote.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

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CABLEVISION SYSTEMS CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Second Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Cable & Telecommunications Association ("NCTA") is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation's cable television subscribers, as well as more than 200 cable programming networks and services. NCTA's members also include suppliers of equipment and services to the cable industry.

NCTA fully supports Cablevision's petition for a writ of certiorari and submits this amicus brief to endorse Cablevision's arguments that changes in the video programming marketplace since this Court's decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"), significantly undermine the continued viability and constitutionality of "must carry" requirements.

As this Court recognized in the *Turner* decisions, the must carry provisions at issue in this case directly and significantly restrict the protected speech of NCTA's members — both its cable operator members, who are compelled to set aside capacity on their systems for broadcast signals that they would

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[1] Counsel for all parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

not otherwise choose to carry, and its cable-program-network members, who must compete for carriage on cable systems and for desirable channel placement without any such guaranteed carriage rights.

Fundamental changes in the marketplace since Congress adopted the must-carry statute in 1992 have substantially eroded the bases on which this Court upheld the constitutionality of such forced carriage. In particular, the development of "ever increasing competition among video providers," *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009), and technological changes have eliminated the "bottleneck control" on which the Court relied in declining to apply strict scrutiny — the standard normally warranted in cases involving forced speech — and in finding that the must carry provisions survived intermediate scrutiny. In addition, far fewer households now rely on over-the-air reception, which also decreases any governmental interest served by the must carry rules.

Finally, NCTA also supports Cablevision's petition for a writ of certiorari because this case provides a much-needed opportunity for the Court to consider an as-applied challenge to the must-carry rules.

INTRODUCTION AND SUMMARY

Although this Court rejected the facial challenge to the must-carry provisions of the 1992 Cable Act in its *Turner* decisions, all the Justices recognized that the statute infringes free-speech values. The plurality acknowledged that the must-carry provisions both "restrain cable operators' editorial discretion in creating programming packages by

'reducing the number of channels over which [they] exercise unfettered control'" and "'render it more difficult for cable programmers to compete for carriage on the limited channels remaining.'" *Turner II*, 520 U.S. at 214, *quoting Turner I*, 512 U.S. at 637. In casting the deciding vote, Justice Breyer similarly recognized that the must-carry provision "extracts a serious First Amendment price." *Turner II*, 520 U.S. at 226. And the dissenters concluded that it was unconstitutional on its face for Congress to "commandeer[] up to one third of each cable system's channel capacity for the benefit of local broadcasters." *Id.* at 251.

Today, the must-carry rules continue to impose a substantial burden on the free-speech rights of cable programmers and cable operators. But much has changed in the market for television programming since the must-carry statute was adopted in 1992. Significantly, these changes in the marketplace call into question many of the considerations underlying this Court's rulings in the *Turner* cases.

In particular, regulations that require a medium of communications to transmit speech that it does not choose to carry are presumptively unconstitutional and generally subject to strict scrutiny. In *Turner I*, however, the Court held that the must-carry provisions were subject only to intermediate scrutiny. 512 U.S. at 661. The Court explained that "special characteristics of the cable medium" — in particular, cable operators' "bottleneck control" over the programming available to cable customers — not only justified this departure from "application of the most exacting level of First Amendment scrutiny," *id.*, but also gave

rise to a real threat of anticompetitive harm that justified the must carry rules under intermediate scrutiny.

In adopting the 1992 Act, Congress feared that cable operators' "bottleneck" control would allow them to decline to carry small broadcasters in order to capture the broadcasters' advertising revenue. Today, however, any potential concern about a cable "bottleneck" has been eviscerated. Satellite operators DirecTV and the EchoStar are now the second and third largest providers of multichannel video programming and the FiOS and U-verse offerings of telephone companies Verizon and AT&T are growing fast. As a result, as the D.C. Circuit recently held in *Comcast Corp. v. FCC*, "[c]able operators ... no longer have the bottleneck power over programming that concerned the Congress in 1992." 579 F.3d at 8.

Both Congress and the *Turner I* Court also noted another facet of the "bottleneck" that it found to have existed in 1992: Once viewers connected their sets to cable, they were essentially foreclosed from obtaining video programming not carried by the cable system. Again, however, these concerns are greatly attenuated today. Because virtually all television sets now include multiple video inputs, attachment of a particular source of programming no longer inherently closes off access to other sources.

The fact that cable can no longer credibly be found to possess bottleneck control over video programming suggests that forced carriage of programming by cable systems may deserve the same strict scrutiny that applies to forced carriage of material by newspapers. But even under intermediate scrutiny, the absence of bottleneck

control means that the burden of must-carry requirements can no longer be justified as necessary to promote a real, non-conjectural threat.

In addition, the fact that the number of over-the-air viewers is now much smaller supports the conclusion that forced carriage is no longer warranted.

REASONS FOR GRANTING THE PETITION

In its *Turner* decisions, this Court upheld the must-carry regime after applying intermediate scrutiny even though it is typically appropriate to apply strict scrutiny to statutes in which the government compels speech, as here. The Court based that decision largely on its finding that cable operators have bottleneck control over what viewers can watch. But changes in the competitive marketplace as well as changes in technology have undermined this finding. And the interest served by the must-carry requirement has decreased in force as the number of over-the-air viewers has decreased. The Court should therefore grant certiorari to re-examine whether compelling carriage of broadcast stations that a cable operator would otherwise choose not to carry can still survive First Amendment scrutiny.[2]

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[2] This case also squarely presents an important issue reserved by the Court in *Turner I*. Specifically, the Court there declined to address the question whether FCC consideration of programming content during market-modification proceedings would require application of the strict scrutiny standard. *Id.* at 643 n.6. In this case, the FCC granted the market modification sought by WRNN based in part on consideration of its programming content, so the question whether strict scrutiny applies cannot be avoided.

CHANGES IN THE VIDEO PROGRAMMING MARKETPLACE AND IN TECHNOLOGY HAVE UNDERMINED THE BASES ON WHICH THE MUST-CARRY PROVISIONS OF THE STATUTE WERE UPHELD.

The Court rejected the facial challenge to the must-carry statute in large part on the ground that cable operators controlled a bottleneck. The finding that cable had bottleneck control over access to video programming was a significant basis for the Court's decision to apply intermediate rather than strict scrutiny. And it was a significant basis for its determination that, under intermediate scrutiny, the must-carry rules addressed an important governmental concern that was real and not merely conjectural. But the development of vibrant competition in the video programming marketplace, as well as the ubiquity of multiple video inputs on television sets have eliminated the bottleneck that the Court had found to exist.

In *Turner II*, the Court emphasized that "[o]nly one percent of communities are served by more than one cable system [and] [e]ven in communities with two or more cable systems, in the typical case each system has a local monopoly over its subscribers." 520 U.S. at 197. This finding of market power was essential to the Court's decision that the must-carry rules were justified. The absence of competition, the Court reasoned, permitted "cable industry favoritism for integrated programmers." *Id.* at 200. Accordingly, the must-carry rules were justified as "regulation[s] designed 'to prevent cable operators from exploiting their economic power to the detriment of

broadcasters.'" *Id.* at 186, *quoting Turner I*, 512 U.S. at 649.

In his short opinion concurring in part, Justice Breyer agreed that "a cable system ... at present (perhaps less in the future) typically faces little competition," and went on in the same sentence to conclude that the resulting control of "the range of viewer choice" justified "*some* degree — at least a limited degree — of governmental intervention." *Turner II*, 520 U.S. at 227. Thus, all five justices voting to uphold the must-carry statute against the facial challenge in the *Turner* cases explicitly recognized that the must-carry rules were premised on the lack of competition. Even then, Justice Breyer emphasized that only a limited degree of governmental intervention was warranted and noted that the future development of competition might eliminate the need for *any* such intervention. *Id.* at 227-28.

Of course, substantial competition *has* developed; indeed there is "ever increasing competition among video providers." *Comcast*, 579 F.3d at 8. The FCC's most recent annual report to Congress on the state of video markets required by 47 U.S.C. § 548(g) documents this increase. That report shows that in 2006 DirecTV was the second-largest provider of multichannel video programming services and EchoStar was the third-largest. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 581 ¶76 (2009) ("*2006 Competition Report*"). DirecTV and EchoStar both provide satellite service and hence compete with cable systems on a nationwide basis, giving most

American households a choice of three providers. Satellite operators initially lacked sufficient spectrum to provide local broadcast channels, but by 2006 at least one of the two satellite providers offered local broadcast channels in "approximately 175 of 210 television markets ..., which represent 97 percent of all U.S. television households." *Id.* at 584 ¶84. The *2006 Competition Report* noted that Verizon had just entered the multichannel video market with "FiOS" and AT&T had just begun to offer "U-verse." *Id.* at 548 ¶14. Only about 14 percent of American households did not subscribe to a multichannel service in 2006. *Id.* at 594-95 ¶108.

NCTA's recent submission providing the FCC updated information on the video-programming market confirms that competition has continued to develop. DirecTV and EchoStar remain the second and third largest multichannel service providers, and DirecTV has grown especially rapidly on account of its aggressive advertising campaign focusing on its high-definition programming. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Comments of the National Cable & Telecommunications Association at 9-11, FCC MB Docket No. 07-269 (May 20, 2009). Verizon's FiOS network is now available to 17 million households in 14 states, and Verizon reported that it gained approximately 300,000 new subscribers in the first quarter of 2009. *Id.* at 12. AT&T's U-verse service gained almost as many new subscribers in that quarter, and AT&T plans to extend its service to 93 markets in 19 states. *Id.*

The D.C. Circuit's recent *Comcast* decision provided the exclamation point regarding the

ongoing increase in competition among video programming providers. The *Comcast* court addressed the 30-percent subscriber limit established by the FCC under 47 U.S.C. § 533(f)(2)(A), vacating that provision because the FCC had failed to adequately consider the effects of the development of competition. The subscriber-limit provision was adopted in the same 1992 legislation that required must carry, and the purpose of the subscriber limit, in the words of the statute, is to ensure that cable operators do not "unfairly impede ... the flow of video programming" by refusing to carry disfavored cable channels. Shortly after its adoption, the D.C. Circuit rejected a facial attack on the constitutionality of the subscriber limit provision, but in 2001 held that the FCC had not adequately justified the 30-percent subscriber limit it adopted. *Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313, 1315 (D.C. Cir. 2000) (rejecting facial challenge); *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1136 (D.C. Cir. 2001) (invalidating 30-percent ownership requirement). The recent decision reviewed the FCC's repromulgation of the 30-percent subscriber limit under a modified rationale. The D.C. Circuit stated that the basis for the subscriber limit is that cable operators once possessed "'bottleneck monopoly power.'" *Comcast*, 579 F.3d at 6, *quoting Turner I*, 512 U.S. at 661. Again, however, the court concluded that "[c]able operators ... no longer have the bottleneck power over programming that concerned the Congress in 1992," *Comcast*, 579 F.3d at 8, and held that the 30-percent subscriber limit could not stand in light of the development of competition.

This significant increase in competition similarly undermines the principal basis on which the must-

carry requirements survived intermediate scrutiny. Cable operators no longer control a bottleneck and there is little reason to be concerned about abuse of a bottleneck that does not exist, whether the potential victim is a cable programmer, as with the subscriber limits, or a broadcaster, as with the must-carry rules. On account of vigorous competition, cable operators must be especially vigilant to offer programming preferred by viewers lest their subscribers switch to a satellite provider or a telephone company. This effect of the development of competition — explicitly anticipated by Justice Breyer, *Turner II*, 320 U.S. at 227 — erodes the basis for determining that must-carry requirements are necessary to prevent a real, not merely conjectural, threat, just as the D.C. Circuit recognized that it undermined the FCC's subscriber limits.

Cable operators' "bottleneck control" was not only the basis on which must carry survived intermediate scrutiny, but also an important ground for the Court's holding that must-carry rules — unlike forced speech requirements generally — should be subject to intermediate rather than strict scrutiny. The Court noted that the technological characteristics of cable systems gave them a degree of physical "bottleneck control" that differentiated them from newspapers, (which clearly could not be compelled to carry speech not of their choosing). Specifically, "the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Turner I*, 512 U.S. at 656. But unlike in the early 1990s, when cable was typically connected to the *only* video input

of a subscriber's television set, virtually all television sets today have multiple inputs, and viewers use these inputs to switch seamlessly among a variety of other devices that provide video content from other sources, including gaming consoles and DVD players. Therefore, any physical bottleneck that cable operators once possessed — like any bottleneck created by market power — no longer exists.

Along with the development of significantly greater competition and technological improvements, the number of Americans who depend on over-the-air signals has declined sharply. When the Cable Act was passed in 1992, 40 percent of Americans still depended on over-the-air broadcasts, and the Court reasoned that must carry was necessary "to preserve access to free television programming" for those Americans. *Id.* at 646. But since 1992, that number has dropped sharply. As the FCC's latest report on competition in the video-programming industry explains, only about 14 percent of U.S. households now depend on over-the-air signals. *2006 Competition Report*, 24 FCC Rcd at 549 ¶16. And even that number—which is based on 2006-2007 data—is overstated because it does not account for the large numbers of Americans who switched to cable or satellite during the digital-television transition. *See* Petition at 20 n.8.

This sharp decline changes the constitutional analysis by diminishing the government's interest in "protecting noncable households from loss of regular television broadcasting service." *Turner I*, 512 U.S. at 647. In *Turner II*, this Court found that interest to be sufficiently "important" to justify burdening the First Amendment rights of cable operators because

"[f]orty percent of American households continue to rely on over-the-air signals for television programming" and because "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." 520 U.S. at 190 (internal citation omitted). But with fewer and fewer Americans relying on broadcast signals as their source of news and information, broadcasting is no longer the "principal source" of information and entertainment for "a great part" of the population, and the government's interest is therefore no longer as significant.

Even the FCC has recognized this point. In December, the Commission initiated an inquiry to determine whether spectrum currently allocated to broadcast television should be reclaimed for more productive use. *See Data Sought on Uses of Spectrum*, Public Notice, 24 FCC Rcd 14275, 14277 ¶¶B.5, D (Dec. 21, 2009) (requesting comments on "the costs to replace over-the-air delivery to MVPDs and consumers with other means (fiber, microwave)" and asking "[w]hat market-based or other incentive mechanisms should the Commission consider to enable broadcasters to choose whether or not to make any spectrum (excess or otherwise) available for reallocation to wireless broadband use"). With even the Commission suggesting that broadcast spectrum should be put to better use, it is clear that broadcast television no longer serves an "important" government interest to the extent that it used to.

Thus, changed circumstances have drastically shifted the balance between the government's interest in the must-carry regime and the burden the

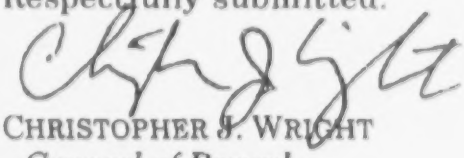
regime imposes on speech, a factor that this Court found crucial in *Turner II*. There, the Court concluded that "the burden imposed by must-carry is congruent to the benefits it affords." *Turner II*, 520 U.S. at 215-16. But given the sharp decline in over-the-air viewership, that conclusion is no longer true.

The Court should grant certiorari in this case to determine how these significant changes to factors that were critical to the Court's decisions in *Turner* affect the constitutionality of the continued application of must-carry requirements.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.



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IN THE

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CABLEVISION SYSTEMS CORPORATION,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICUS CURIAE* TIME WARNER CABLE INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE TIME WARNER CABLE INC.[1]

Amicus Time Warner Cable Inc. ("TWC") is the second largest cable operator in the country, with over 14 million customers in 28 states. TWC offers its customers various products and services, including cable television, high speed Internet, and telephone. TWC is recognized as a leader in cable and fiber optic technology, and in 1994, became the first cable company to receive an Emmy Award by winning the Engineering Award for Outstanding Achievement in Technological Development for its pioneering work in using fiber optics to transmit broadband signals.

As a cable operator, TWC, like Petitioner Cablevision, is subject to the must-carry regime set forth in the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"). 47 U.S.C. § 534(a), (c), (h)(1)(A). Under that regime, cable operators are obligated to set aside a portion of their channel capacity to carry the signals of local broadcasters who elect "must-carry" status. In the absence of must-carry, TWC would exercise its editorial discretion and business judgment in determining what programs to carry on its system based upon many factors, including customer demand.

[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amicus, made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief and their written consents are on file with the Clerk of this Court.

TWC, like Petitioner Cablevision, has also had dealings with intervenor-broadcaster WRNN that exemplify the negative real world impact of the must-carry regime as applied in today's marketplace. TWC believed at the time of the passage of the 1992 Cable Act that the must-carry provisions were not consistent with the First Amendment to the United States Constitution. The Company was involved in the cable industry's facial challenge to the must-carry requirements which led to this Court's *Turner* decisions, which ultimately upheld the must-carry regime in a pair of 5-4 decisions. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994) ("Turner I"); *Turner Broadcasting System, Inc* v. *FCC*, 520 U.S. 180 (1997) ("Turner II").

To say that the market for video programming has changed in the 18 years since Congress enacted must-carry legislation and the subsequent *Turner* decisions would be a dramatic understatement. TWC faces intense competition today for increasingly technologically sophisticated consumers who have a vast array of options from which to get their video programming content, such as satellite companies, telephone companies, and the Internet. Because of these dramatic changes in the ever-more-competitive marketplace, the rationale underlying the *Turner* decisions has been eviscerated. TWC believes that Cablevision's petition for certiorari raises important questions about the continued vitality of the must-carry regime that are well worthy of consideration by this Court.

SUMMARY OF ARGUMENT

Time Warner Cable's own experience with WRNN demonstrates the mischief caused by the must-carry regulations. WRNN, a station licensed in Kingston, NY, had historically never been carried on TWC's New York City cable system. Kingston is far away from New York City—both geographically (over 80 miles) and culturally. The program line-up of WRNN is primarily home shopping and infomercials, one that is of limited interest to TWC's urban subscriber base in New York City. WRNN offers, at best, a tiny amount of token programming directed toward New York City viewers, and in fact, offers very little programming that is local even to Kingston, its community of license. Threatened with a potential must-carry order from the Federal Communications Commission ("FCC"), however, TWC decided it would rather strike a deal with WRNN. Under the must-carry regime, TWC would be obligated to carry WRNN in an analog format. This is significant because analog carriage uses much more bandwidth than digital—up to ten times more to carry only one channel. Rather than risk losing this valuable bandwidth on its cable system, TWC decided to provide WRNN (i) two digital channels in exchange for the one must-carry analog channel; and (ii) carriage on TWC's Albany system, an area not normally within WRNN's local market. The end result was the forced carriage of two channels that are of little to no interest to TWC's subscribers.

As the WRNN example illustrates, given the competitive marketplace in which TWC operates today, must-carry acts as far too blunt an instru-

ment. The competitive and technological market place for the delivery of video programming has changed dramatically since the must-carry regime was narrowly approved by this Court in its *Turner* decisions. TWC faces intense competition from other companies providing video content services to consumers: traditional broadcasters, satellite companies such as DIRECTV and Echostar, large and well-capitalized telephone companies including Verizon and AT&T, and multiple portals on the Internet, such as YouTube, Hulu and other streaming video websites all of which were unheard of in 1992. At the same time, broadcasters have demonstrated through their actions their own increased market power in the changed competitive landscape, most often choosing not to opt-in to the must-carry regime at all. Must-carry remains as a relic of a by-gone era that is not needed to protect the broadcast industry, and at worse, leads to twisted incentives that run against the value of "localism," one of the goals must-carry was supposed to protect.

All of these changes lead to one conclusion: this Court's *Turner* decisions are based upon economic and technological suppositions that are simply inconsistent with the realities of the marketplace. This conclusion is supported by the recent decision of the D.C. Circuit Court of Appeals, which recognized that cable operators no longer possess the bottleneck power that in large part drove the *Turner* decisions. *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("Cable operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992"). And even more recently, this Court, citing to *Turner I*

itself, warned of the dangers of making differentiations between preferred and disfavored forms of speech which may become "irrelevant or outdated by technologies that are in rapid flux." *Citizens United* v. *FEC*, No. 08-205, Slip. Op. at 9 (Jan. 21, 2010) (citing *Turner I)*. Cablevision's petition for certiorari raises important questions about the viability of must-carry in today's market, questions worthy of this Court's review.

ARGUMENT

I. TIME WARNER CABLE'S EXPERIENCE WITH WRNN DEMONSTRATES THE MISADVENTURE OF MUST-CARRY

A. The Must-Carry Regime and the Turner Decisions

Under the must-carry provisions of the 1992 Cable Act, cable operators such as TWC are required to carry the signals of a number of local broadcasters. 47 U.S.C. § 534(a), § 535(a). The statute generally requires cable operators to set aside up to one-third of their channels for mandatory carriage of commercial television stations. *Id.* § 534(b)(1)(B). Cable operators are not obligated to carry signals of distant broadcasters; rather, the must-carry regime applies to the signals of broadcasters deemed to be "local" as to each community served by the cable system. *Id.* § 534 (h)(1)(A). Thus an important question under the must-carry regime is determining a broadcast station's local status.

Currently, the FCC determines the local status of a commercial television station by using

information generated by Nielsen Media Research that divides the nation into a series of geographic Designated Market Areas based on viewership patterns. 47 C.F.R. § 76.55(e)(2). The 1992 Cable Act also contains a market modification provision which serves as the crux of the present litigation. Under the market modification provision, the FCC may, on written request, add certain communities to, or exclude certain communities from, a given broadcast station's local market "to better effectuate the purposes of the statute." 47 U.S.C. § 534(h)(1)(C)(i). In reviewing market modification requests, the FCC is supposed to examine four statutory factors intended to "afford particular attention to the value of localism," including "whether the television station provides coverage or other local service to [the] community." *Id.* § 534(h)(1)(C)(ii).

In this Court's *Turner* decisions, the Court narrowly upheld the must-carry regime against a facial attack brought by TWC and other cable operators and programmers. In *Turner I*, Justice Kennedy wrote for the 5 member majority, holding that the Cable Act's requirements were generally content neutral and thus subject to intermediate scrutiny.[2] The Court identified three "important"

[2] The Court's opinion, however, explicitly carved out the market modification provision at issue in the instant litigation, noting that it appeared to be content-based due to its focus on the "value of localism", and noted that the district court did not address this issue below but could do so on remand. 512 U.S. at 643 n.6 (quotation mark omitted). In its decision below, the Second Circuit recognized that the constitutionality of the market modification provision was a question left open by *Turner I*. *Cablevision Systems Corp.* v. *FCC*, 570 F.2d 83, 97 (2d Cir. 2009).

goals served by must-carry in the abstract: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." 512 U.S. 622, 662 (1994). The Court, however, found that the record was not adequate for determining whether the statute was sufficiently tailored to address those interests without burdening too much speech and remanded the case for further fact finding. *Id.* at 667-68.

Three years later, with a developed record, this Court held that the must-carry provisions satisfied intermediate scrutiny. *Turner II*, 520 U.S. 180 (1997). Justice Breyer, who gave the majority its fifth vote, wrote separately to state that he did not agree that promoting fair competition in the marketplace for television programming qualified as an important governmental interest of the 1992 Cable Act. *Id.* at 226. Instead, Justice Breyer grounded his opinion in the governmental importance of insuring over-the-air "access to a multiplicity of information sources." *Id.* (quotation marks omitted). Foreshadowing the future, Justice Breyer observed that the evidence showed that "a cable system . . . at present *(perhaps less in the future)* typically faces little competition, [and] that it therefore constitutes a kind of bottleneck that controls the range of viewer choice . . . ." *Id.* at 227-28 (emphasis added).

With this background in mind, TWC turns to its experiences with the must-carry rules, and in particular, its dealings with WRNN, the broadcaster-intervenor in this case.

B. Time Warner Cable's Experience With WRNN and the Must-Carry Rules

TWC provides cable television service to much of New York City, including Manhattan, Brooklyn, Queens, and Staten Island. WRNN is a television station licensed in Kingston, NY. It primarily broadcasts home shopping, infomercials, and other paid programming. Kingston is far away from New York City in every sense of the word—geographically (*e.g.*, approximately 89 miles from Brooklyn), politically, and culturally. Thus, it is no surprise that historically, TWC did not carry WRNN on its New York City systems.

In the late 1990's, TWC prevailed in an action that, under the very market modification provision at issue in this case, excluded the portions of New York City served by TWC from WRNN's "television market", *i.e.*, the area in which it is entitled to demand must-carry status. Pet. of Time Warner New York City Cable Group for Modification of ADI for Station WRNN, Kingston, NY, 11 FCC Rcd 6528 (CSB 1996), *recon. denied*, Market Modifications and the New York Area of Dominant Influence, 12 FCC Rcd 12262 (1997), *aff'd*, *WLNY-TV, Inc.* v. *FCC*, 163 F.3d 137 (2d Cir. 1998). The primary basis for the market modification ruling was that WRNN's Grade B contour coverage—the area in which viewers could receive an adequate broadcast signal over-the-air—did not reach the New York City area.

WRNN thereafter moved its broadcasting tower 50 miles closer to New York City and—while maintaining its city of license as Kingston—opened a studio in Manhattan that it designated

as its "head studio." Later that year, WRNN filed a Petition for Special Relief before the FCC for market modification to add the New York City specific communities back into its television market in order to be eligible for must-carry status as to TWC.

TWC opposed WRNN's petition on numerous grounds, many of which track those cited by Cablevision here. For example, TWC pointed out that WRNN failed to provide local programming of interest to the NYC communities, but rather primarily provided programming of a very generic sort such as home shopping and infomercials. TWC noted that only one program, "NYC Metro Live," appeared to cover any issues of local importance, and it was only broadcast for 4.5 hours a week, or less than 2.7% of WRNN's weekly broadcast schedule. In contrast, TWC set forth the plethora of local programming carried on its system by other providers. TWC also pointed out that, ironically, given broadcasters' supposed responsiveness and benefit to local communities, WRNN's line up had very little programming that was directed toward its local community of license —Kingston. Instead, WRNN, a predominantly home shopping network, appeared to be ignoring its own local community while presenting a token amount of programming directed to New York City that would permit a facially plausible must-carry argument for expanded carriage into New York City's larger commercial market.

The Second Circuit's decision below in this action makes reference to TWC's dispute with WRNN, noting that the FCC's Media Bureau granted WRNN's petition and that TWC did not

appeal the decision to the full Commission. *Cablevision*, 570 F.3d at 91. While that much is true, it does not tell the full story of TWC's experience with WRNN. Due to the coercive and distorting effect of the must-carry rules, TWC made the business decision that it was better to settle with WRNN than to continue with litigation.

The deal TWC struck is instructive of the mischief caused by the must-carry rules. Under the must-carry regulations, a broadcaster entitled to must-carry status must be carried in analog format by a cable company such as TWC which has both analog and digital capabilities. *See* Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, CS Docket No. 98-120, FCC 07-170 (rel. Nov. 30, 2007) (Third Report and Order). This is significant because analog carriage takes up far greater bandwidth than digital carriage. Every analog channel takes approximately 6 MHZ of bandwidth. That same bandwidth could be used to offer TWC's customers 10 digital channels. In other words, TWC could offer its customers 10 different channels of varying subject matters, including those with local interest, but because of must-carry, it must instead offer only WRNN, a predominately home shopping station with, at best, a token amount of local programming that one suspects was included solely to game the must-carry regulations in general and the market modification provision in particular. Putting aside the harm to TWC's First Amendment rights to determine what it should carry on its own cable system, it is difficult to see how this result advances the consumer's interests, or the interest

supposedly served by the must-carry rules themselves: preserving free, over-the-air local broadcasting and promoting a widespread dissemination of information from a multiplicity of sources.

To make matters worse, the must-carry regime further obligates TWC to carry must-carry signals on the same channel position assigned to the broadcaster in the broadcasting frequency. 47 U.S.C. § 534(b)(6). This means that TWC would have to carry a broadcaster on a specific channel on its line-up, even if that numerical channel was already assigned to a different content provider. In the case of WRNN, all these rules would have obliged TWC (in the event WRNN prevailed on its petition) to carry WRNN in analog format and on channel 48, which would have necessitated TWC's removal of an already existing channel, most likely C-SPAN 2, from its analog line up in order to have enough capacity to carry WRNN. It is ironic indeed that the must-carry provisions would lead to such a result—the replacement of C-SPAN 2, a commercial-free service offering exclusively government and public affairs programming, with a home shopping/infomercial station on a valuable analog channel.

To avoid these must-carry costs, TWC agreed to withdraw its opposition to WRNN's petition before the FCC and to give WRNN *two* channel slots in a digital format, and to offer carriage on TWC's Albany system, an area not otherwise in WRNN's market. In exchange, WRNN agreed to relinquish its must-carry rights, including its right to one analog channel.

TWC's experience with WRNN is not an anomaly. Since the FCC adopted its current must-carry rules in 1993, TWC has been involved in over 40 disputes in which it has defended against must-carry complaints or has sought modification of local station markets to avoid carriage of stations not deemed of sufficient interest to TWC subscribers in particular communities. And, as explained more fully below, given the changing competitive and technological landscape, must-carry's distorting and negative effect has grown only more disproportionate. Whatever "fit" may have existed at the time of *Turner* between the goals served by the must-carry regulations and the speech price paid by cable operators and programmers is no more.

II. DRAMATIC CHANGES IN THE MARKETPLACE AND TECHNOLOGY SINCE THE 1992 CABLE ACT AND THE *TURNER* DECISIONS MANDATE REVIEW OF THE MUST-CARRY REGIME

As the petition for certiorari demonstrates, fifteen years after *Turner I*, the constitutionality of the must-carry provision of the 1992 Cable Act is ripe for review. *Turner*'s analysis is keyed to industry conditions long outdated. The state of the industry is rapidly changing—indeed, has changed substantially even over the course of this litigation—and is radically different from the *Turner* era. The must-carry provision, bolstered by the *Turner* decisions, is a study in the law of unintended consequences, and a look at the present state of the industry illustrates the

perversions to which a regulatory regime can lead once its factual underpinnings vanish.

Turner I's rationale was grounded in a particular time, at a particular moment in the development of video technology, when the power of cable companies was on the rise and consumers had relatively few alternatives and correspondingly little control. *See, e.g.*, *Turner I*, 512 U.S. at 632-33 ("increasing concentration of economic power in the cable industry" and exclusivity based on infrastructure); *id.* at 633 (industry characterized by power of cable companies relative to broadcasters); *id.* at 634 (increasing vertical and horizontal integration).[3] This Court found that the regulations were "justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id.* at 661. Even at the time, however, the Court recognized the "pace of technological advance-

[3] The same is true in *Turner II*, where the Court relied heavily on the notion that cable maintained a monopoly, and that both horizontal and vertical integration were trending upward. *E.g.*, *Turner II*, 520 U.S. at 197-98, 206-07. Tellingly, *Turner II* arrived at the Supreme Court after a remand to consider additional factual material on a summary judgment motion, and much of the opinion was devoted to the consideration of various studies that are woefully out of date. *See, e.g.*, *id.* at 200 (specific evidence of cable providers' favoritism toward vertically-integrated content providers); *id.* at 206 (information that "[o]n average, even the lowest rated station added pursuant to must-carry had ratings better than or equal to at least nine basic cable program services carried on the system"); *id.* at 214 (studies finding that cable operators were required to make few substantial changes as a result of the must-carry regime).

ment," and noted that there was an "ongoing telecommunications revolution with still undefined potential to affect the way [people] communicate and develop [ ] intellectual resources". *Id.* at 627. *See also Citizens United*, Slip Op. at 9 (citing *Turner I* for the proposition that courts should be wary of making distinctions between favored and disfavored forms of speech which may become "irrelevant or outdated by technologies that are in rapid flux").

As early as 1995, commentators began to recognize that the *Turner I* decision's reasoning—based as it was on the status of an obviously dynamic technological industry—invited obsolescence.[4] Recent scholarly articles, with the

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[4] *See, e.g.*, Ronald W. Adelman, *Turner Broadcasting and the Bottleneck Analogy: Are Cable Television Operators Gatekeepers of Speech?*, 49 SMU L. Rev. 1549, 1550 (July-August 1996) ("The de facto monopoly that most cable operators have historically enjoyed in their service areas—a prerequisite to the Court's bottleneck analysis—may soon be a thing of the past."); James A. Bello, Comment, Turner Broadcasting System, Inc. v. FCC: *The Supreme Court Positions Cable Television on the First Amendment Spectrum*, 30 New Eng. L. Rev. 695, 744 (1995-1996) ("[T]he advent of new technology[] [has] brought about increased competition in the cable television market. Thus, the economic justification for imposing must-carry on cable operators is quickly becoming moot."); Henry Geller, *Turner Broadcasting, the First Amendment, and the New Electronic Delivery Systems*, 1 Mich. Telecomm. & Tech. L. Rev. 1, 26-27 (1994-1995) ("With the inevitable digital revolution and its convergence of media [ ], there will be no way to distinguish between the media. . . . [T]he bottleneck aspect of cable television, which understandably drove the decisional process in *Turner*, will disappear.").

benefit of hindsight, have also suggested that it is time for the *Turner* regime to come to an end.[5]

A. The Bottleneck Analogy No Longer Applies In A Vibrant and Technologically Advanced Market.

Vibrant competition in the marketplace for provision of video services has swept far beyond what anyone could have dreamed in 1992. It continues to change even as this petition is briefed. The most recent Annual Report from the FCC, which itself lags several years behind,[6] suggests that the proliferation of alternative forms of delivery of video content has already transformed the industry in a manner far from that portrayed to the Court when it decided *Turner*. *See* Federal Communications Commission, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video*

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[5] *See, e.g.*, Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, 3 Charleston L. Rev. 373, 393 (Winter 2009) ("[W]hatever Turner Broadcasting's merits when it was decided, ... [t]oday, with many more media outlets available, along with the Internet, the justification, if ever there were any, for providing special protection to local broadcasters at the expense of cable operators' First Amendment rights is even more problematic. . . .).

[6] The Report, adopted in 2007 and published in 2009, only reflects data from 2006. The 1992 Cable Act provides that the FCC shall provide annual reports to Congress on the status of the cable market. 1992 Cable Act, Pub. L. No. 102-385 (codified as amended at 47 U.S.C. § 548(g)). Those reports are evidence in themselves of the dramatic changes that have occurred in the industry. *See* Report; *see also id.*, at p. 2 n.1 (citing the Commission's previous reports, beginning in 1994).

Programming, Thirteenth Annual Report ("Report") (adopted Nov. 27, 2007, released Jan. 16, 2009).

By 2006, cable's competitive advantage had decreased substantially. In the area of traditional provision of video services, cable penetration rates had decreased, while satellite companies' share of the multichannel marketplace increased by 7.1% and Local Exchange Carriers (LECs), like Verizon's FiOS, expanded their service areas. Report, at pp. 6-7, 39-40. In Comments submitted to the FCC in May 2009, the National Cable & Telecommunications Association ("NCTA") noted that cable's share of the video marketplace had dropped from 68.17% in June 2006 to 63.5% in 2009; that satellite companies' revenues were up 8.3% from 2007; and that the number of homes with FiOS and AT&T's U-Verse availability had "more than quadrupled since 2008." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Comments of the NCTA (May 20, 2009) ("NCTA Comments"), at pp. 8-12. The trajectory of the industry suggests that cable television will continue to lose subscribership while alternative technologies increase in popularity; given these realities, any monopoly that cable may have had is inalterably broken.

Traditional over-the-air broadcasters still compete with cable operators. However, the percentage of Americans who receive their television programming solely from over-the-air broadcasts has declined significantly since *Turner*. The *Turner I* Court noted that "nearly 40 percent of American households still rel[ied] on broadcast

stations as their exclusive source of television programming." 512 U.S. at 663. Today, that landscape has shifted dramatically. As of the 2006 FCC Report, almost 87% of households subscribed to an MVPD service; only 14% of the total U.S. television households relied solely on over-the-air service. Report, at pp. 5, 8. Even this small number was expected to drop after broadcasters' transition from analog to digital in June 2009. NCTA Comments, at p. 16.

Moreover, data regarding the more traditional forms of video delivery no longer present a complete portrait of the competition facing cable companies. The 2006 FCC Report addressed several new sources of content when they were still in their relative infancy, finding that both online/mail DVD services like Netflix and streaming Internet video were swiftly becoming part of the ever-growing community of video providers. Netflix was increasingly identified as a competitive alternative to cable "because it offer[ed] services similar to premium and pay-per-view offered by" video content providers, even permitting customers to rent DVDs via streaming video. Report, at pp. 79-80. As to Internet video, in 2006 three out of five Internet users viewed media online in some form, and roughly the same number downloaded video content; as an example, more than 34 million people visited YouTube in August 2006.[7] *Id.*, at pp. 72-73. It is important to

[7] Time Warner Cable is a provider of Internet services, and that side of the business benefits from increased Internet offerings. This does not, however, negate the powerful effect that the Internet has had—and will continue to have—on the traditional cable television business.

note that over-the-air viewers (not just MVPD subscribers) can and do avail themselves of many of these newer alternatives; thus, such viewers have many additional choices of video content than they had when must-carry was adopted.

Usage of these new technologies has only increased since the 2006 FCC Report. By 2009, the NCTA reported a 70% gain in revenue for Netflix in the first quarter of 2008 and a 25% increase in subscribership. NCTA Comments, at p. 15. Similarly, by 2009, the popularity of Internet streaming video had increased, and more than 6 *billion* videos were viewed on YouTube in January 2009 alone. *Id.*, at pp. 4-5. Hulu, owned by Fox Corp., NBC Universal, and Disney/ABC, is another Internet portal for viewing videos that is gaining in popularity. In January 2010, over 600,000 videos were viewed on Hulu, which ranked second to YouTube that month. *See* Neilsenwire, Total Viewers of Online Video Increased 5% Year-Over-Year, Feb. 11, 2010, available at http://blog.nielsen.com/nielsenwire/online_mobile/total-viewers-of-online-video-increased-5-year-over-year/.

Technological changes have also revolutionized the industry as compared to the time of *Turner*. Cable customers are offered a multitude of services and products, including not only cable television with hundreds of channels, but also high speed Internet access, interactive two-way digital applications, and telephone service delivered through Internet protocol. Cable television customers are offered high definition (HD) channels, video-on-demand, and digital video recording (DVR) permitting subscribers to

customize their viewing experience. Further, both cable subscribers and over-the-air viewers are able to hook up new devices to their television sets, such as iPods, Apple TV, Boxee, and DVD players, all of which provide different channels for video content and negate the dated concern that cable, through placement of its cable set top box, would act as a physical bottleneck with respect to information sources. Such technological changes have in turn further fueled intense competition in the industry.

Given these drastic changes, the bottleneck theory under girding the *Turner* decisions is no longer viable.[8] This reality was recently recognized by the D.C. Circuit Court of Appeals in the *Comcast* decision which struck down as arbitrary and capricious the FCC's 30% market share cap on subscribers to be served by any one cable operator: "Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. *Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992.*" *Comcast*, 579 F.3d at 3, 8 (emphasis added).

[8] The vertical integration argument often raised by proponents of must-carry is a red herring. Vertical integration has always been discussed in conjunction with concerns about a horizontal stranglehold on the media industry on the part of cable, *see, e.g., Turner I*, 512 U.S. at 634, which, as discussed *supra*, no longer exists.

B. Broadcasters Have Demonstrated Market Strength and Do Not Need Must-Carry in Today's Competitive Market

The Cable Act provides that every three years, local commercial broadcasters must choose whether they wish to apply for carriage on a cable system through a retransmission agreement, or whether they elect must-carry status. 47 U.S.C. § 325(b)(3)(B). In TWC's experience, the large majority of broadcasters elect retransmission consent over must-carry. For example, in the Hudson Valley system, there are 15 retransmission consent broadcasters as compared to only 3 must-carry broadcast stations. In North Carolina, Raleigh carries 6 broadcasters by retransmission consent and only 3 by must-carry. In Charlotte, all 8 broadcast stations are carried via retransmission agreement; none have chosen must-carry. Not surprisingly, the broadcasters choosing must-carry have much lower viewership than other broadcasters. This trend is generally played out throughout TWC's operations around the country.

The fact the large majority of broadcasters choose to be carried via retransmission agreement rather than must-carry demonstrates, in and of itself, that must-carry is simply not needed to protect the broadcaster industry. Moreover, the vibrant competitive market place in which TWC operates insures that even less popular local broadcast stations, so long as they have content of interest to local subscribers, would be carried by TWC in the absence of must-carry. This is made all the more likely due to the increased channel capacity on TWC's systems as compared to 15

years ago. If TWC fails to be responsive to subscriber demands, TWC will suffer a loss of subscribers to competitors.

In addition to the reality that most broadcasters choose retransmission consent over must-carry, many broadcasters are beginning to demand payment for carriage of their content— content that is broadcast for free over-the-air. This market development, unimaginable at the time the must-carry regime was instituted, renders Congress's efforts to protect the broadcast industry unnecessary. *See, e.g.*, Jessica Reif Cohen *et al.*, Media and Cable: The Tide Has Turned, Bank of America/Merrill Lynch Analyst Report, at p. 1 (Jan. 6, 2010) (recent events "turn[] the tide in favor of broadcasters for negotiating leverage"); Brian Stelter, *Broadcasters Battling for Cable Fees*, N.Y Times, Dec. 29, 2009.

In addition, broadcasters have a much greater likelihood of carriage on cable today due to the increased channel capacity on cable systems. While TWC still has a limited amount of bandwidth and cannot carry all who seek carriage, it is able to provide a far broader array of channel choices to viewers than it could 15 years ago. For example, TWC's Brooklyn cable system currently offers hundreds of channels to subscribers, including multiple offerings that appeal to local and niche markets in particular communities. A local broadcaster with programming of interest to local subscribers would find carriage on TWC's cable system without must-carry; if TWC is not responsive to the demands of its local subscriber base, TWC risks losing customers to competitors.

To the extent that the must-carry provisions, and by extension the *Turner* cases, were predicated on a desire to protect broadcast stations, current market realities illustrate that this protection is no longer necessary or useful to the purposes this Court has identified in upholding it. Power exerted by broadcast stations, combined with a substantial increase in the number of available communicative channels accessible through digital cable, satellite service, telephone companies, DVD players and other consumer devices, as well as the Internet, ensures that the vast majority of Americans can access the multiplicity of sources of information that Congress intended to protect. This is true whether a consumer is an over-the-air viewer or a subscriber to an MVPD service such as cable.

Moreover, at its extreme, the must-carry regime has led to results in tension with at least one of the aims of must-carry: to promote the value of localism. Historically, one of the attributes of local broadcast stations was its focus on local news and issues; indeed, it was at least partially a respect for localism that inspired Congress to initiate must-carry. *See, e.g.*, H.R. Rep. No. 628, 102nd Cong., 2d Sess. (1992) ("Congress long has advocated broad access to public television services, regardless of the technology used to deliver those services, in order to advance the compelling governmental interest in increasing the amount of educational, informational, and local public interest programming available to the nation's audiences."); *id.* at 69 ("Local public television stations also provide a variety of special services to their communities, including local

news and public affairs programs, programs offering outlets for local cultural and artistic groups, and coverage of local and state government activities and personalities."); *see also Turner I*, 512 U.S. at 634 ("In light of these technological and economic conditions, Congress concluded that unless cable operators are required to carry local broadcast stations, '[t]here is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried,'; the 'marked shift in market share' from broadcast to cable will continue to erode the advertising revenue base which sustains free local broadcast television, and that, as a consequence, 'the economic viability of free local broadcast television and its ability to originate *quality local programming* will be seriously jeopardized.'") (internal citations omitted, emphasis added).

By giving broadcasters a free-pass—*i.e.*, automatic carriage—the must-carry regime has distorted broadcasters' decision making process, perversely incentivizing them to forego the interests of their local communities. A broadcaster who can take advantage of must-carry can effectively ignore its local community and broadcast programming of any content, be it generic entertainment, home shopping, or otherwise, and still demand carriage. WRNN offers a case in point. First, WRNN was able to ignore its community of license, Kingston, and build a predominately home shopping/infomercial network and still demand carriage in its legitimate market area. And then, by putting only a token amount of programming geared towards New York City viewers, it was able to demand

expanded carriage of its predominantly home shopping network in New York City. This is clearly not the "quality local programming" that the Court had in mind in discussing the must-carry system in *Turner I*. 512 U.S. at 634.

The competitive marketplace and the technological landscape for video programming distribution has undergone major changes since this Court's *Turner* decisions. Cable operators now clearly face vibrant competition and the bottleneck description no longer even plausibly applies. Broadcasters do not need must-carry to survive and most do not take advantage of this outdated mechanism, leaving it to aid only those broadcasters with programming that is not of interest to viewers or, worse, that is not consistent with the "value of localism" that must-carry was designed to protect. The viability of the must-carry regulations, including the market modification provision presented in Cablevision's challenge, is a critically important question affecting communication, competition, and commerce throughout our country. It is a question well worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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